- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Originated: 04/03/1996 Mailing Information

Mailing List

SM/SB #	CSM-4499 Claimant City of Sacramento Test Claim
overnment Code Section	amending sections 3300-3310
apters	465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,
sue	Peace Officers Procedural Bill of Rights

Mr. James Apps (A-15),
Department of Finance

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SACRAMENTO CA 95814-2711 *FAX:* (916) 264-8110

Ms. Ferlyn Junio,
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4320 Auburn Blvd. Suite 2000 *Tel:* (916) 485-8102
SACRAMENTO CA 95841 *FAX:* (916) 485-0111

CSM/SB #	CSM-4499	**Claimant**	City of Sacramento Test Claim
Government Code Section	amending sections 3300-3310		
Chapters	465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,		
	Peace Officers Procedural Bill of Rights		

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Youth & Adult Correctional Agency

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SACRAMENTO CA 95814 — *FAX:* (916) 442-2637

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State Personnel Board

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RAMENTO CA 95814 — *FAX:* (916) 653-8147

Mr. Floyd Shimomura, Chief Counsel MIC:83
Department of Finance

State Capitol Room 1145 — *Tel:* (916) 445-3878
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Department of Employee Relations

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Mr. Michael Vigliota, Paralegal
Santa Ana Police Department
City Attorney's Office
60 Civic Center Plaza — *Tel:* (714) 245-8555
SANTA ANA CA 92702 — *FAX:* (714) 245-8090

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500 — *Tel:* (916) 445-8756
RAMENTO CA 95816 — *FAX:* (916) 323-4807

SM/SB #	CSM-4499	**Claimant**	City of Sacramento Test Claim
overnment Code Section	amending sections 3300-3310		
hapters	465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,		
sue	Peace Officers Procedural Bill of Rights		

Mr. David Wellhouse,
Wellhouse & Associates

9175 Kiefer Blvd Suite 121
SACRAMENTO CA 95826

Tel: (916) 368-9244
FAX: (916) 368-5723

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 1300 "I" Street, Suite 950, Sacramento, California 95814.

On December 1, 1999, I served the

Adopted Statement of Decision
Peace Officers Procedural Bill of Rights, CSM-4499
Government Code Sections 3300 through 3311
Statues of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174 and 1178; Statues of 1979, Chapter 405; Statues of 1980, Chapter 1367; Statues of 1982, Chapter 994; Statues of 1983, Chapter 964; Statues of 1989, Chapter 1165; and Statues of 1990, Chapter 675

by placing a true copy thereof in an envelope addressed to each of the persons listed on the **mailing list**, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 1, 1999, at Sacramento, California.

Tammie Beasley
TAMMIE BEASLEY

DRAFT PARAMETERS AND GUIDELINES

City of Sacramento - Test Claimant

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174 and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367;
Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964;
Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

I. SUMMARY AND SOURCE OF THE MANDATE

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted the Peace Officers Procedural Bill of Rights (POBAR), Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174 and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675.

The legislation provides procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency, and peace officers on probation who have not reached permanent status.

On August 26, 1999, the Commission found that the test claim legislation constitutes a partial reimbursable state mandated program within the meaning of article XIIIB, section 6 of the California Constitution.

II. ELIGIBLE CLAIMANTS

Counties, cities, a city and county, school districts and special districts which employ peace officers are eligible claimants.

III. PERIOD OF REIMBURSEMENT

At the time this test claim was filed, Section 17557 of the Government Code stated that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. On December 21, 1995, the City

of Sacramento filed the test claim for this mandate. Therefore, costs incurred for Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174 and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675 are eligible for reimbursement on or after July 1, 1994.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to section 17561, subdivision (d)(1) of the Government Code, all claims for reimbursement of initial years' costs shall be submitted within 120 days of notification by the State Controller of the issuance of claiming instructions.

If total costs for a given year do not exceed $200, no reimbursement shall be allowed, except as otherwise provided by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

For each eligible claimant, all direct and indirect costs of labor including overtime, supplies and services, training and travel for law enforcement, human resources, legal counsel and other departments or contract services for the performance of the following activities, are eligible for reimbursement:

A. Administrative Activities

1. Developing or updating policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities.

2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate.

3. Maintenance of the systems to conduct the mandated activities.

4. Providing direct supervision over the agency staff performing the mandated activities.

B. On-Going Activities

1. Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions, together with the defense of same in any court proceeding (Gov. Code, § 3304, subd. (b)):

   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are *not* affected (*i.e.*: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);

- Transfer of permanent, probationary and at-will employees for purposes of punishment;

- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and

- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Included in the foregoing, but not limited thereto, are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.

2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

Included in the foregoing, but not limited thereto, is the review of the necessity for the questioning and responses given; providing notice to all parties concerned of the time and place of the interview and scheduling thereof; preparation and review of overtime compensation requests; review of proceedings by counsel.

3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)

Included in the foregoing, but not limited thereto, is the review of the nature of the interrogation; review by counsel; determination of the investigating officers; redaction of the complaint for names of the complainant or other accused parties or witnesses or confidential information; and preparation and presentation to officer of notice or complaint.

4. Producing transcribed copies of any notes made by a stenographer or tape recording at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, whether or not the investigation results in any disciplinary action (Gov. Code, § 3303, subd. (g)).

Included in the foregoing, but not limited thereto, is the review of the complaints, notes or tape recordings for issues of confidentiality by law enforcement, human relations or counsel; cost of tape copying, tape and storage; cost of transcription, processing, service and retention of copies.

5. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;

- Providing an opportunity to review and sign the adverse comment;

- Providing an opportunity to respond to the adverse comment within 30 days; and

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;

- Providing an opportunity to review and sign the adverse comment;

- Providing an opportunity to respond to the adverse comment within 30 days; and

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;

- Providing an opportunity to respond to the adverse comment within 30 days; and

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Included in the foregoing, but not limited thereto, are review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; officer's time in response to adverse comment; review of response to adverse comment, attaching same to adverse comment and filing.

V. CLAIM PREPARATION AND SUBMISSION

Claims for reimbursement must be timely filed and identify each cost element for which reimbursement is claimed under this mandate. Claimed costs must be identified to each reimbursable activity identified in Section IV of this document.

SUPPORTING DOCUMENTATION

Claimed costs shall be supported by the following cost element information:

A. Direct Costs

Direct Costs are defined as costs that can be traced to specific goods, services, units, programs, activities or functions.

Claimed costs shall be supported by the following cost element information:

1. Salaries and Benefits

Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the reimbursable activities performed and specify the actual time devoted to each reimbursable activity, the productive hourly rate, and related employee benefits.

Reimbursement includes compensation paid for salaries, wages, and employee benefits. Employee benefits include regular compensation paid to an employee during periods of authorized absences (e.g., annual leave, sick leave) and the employer's contributions to social security, pension plans, insurance, and workers' compensation insurance. Employee benefits are eligible for reimbursement when distributed equitably to all job activities performed by the employee.

2. Materials and Supplies

Identify the expenditures that are a direct cost of this mandate. List the cost of the materials and supplies consumed specifically for the purposes of this mandate. Purchases shall be claimed at the actual price after deducting cash discounts, rebates and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged based on a recognized method of costing, consistently applied.

3. Contract Services

Provide the name(s) of the contractor(s) who performed the services, including any fixed contracts for services. Describe the reimbursable activity(ies) performed by each named contractor and give the number of actual hours spent on the activities, if applicable. Show the inclusive dates when services were performed and itemize all costs for those services. Submit contract consultant and attorney invoices with the claim.

4. Travel

Travel expenses for mileage, per diem, lodging, and other employee entitlements are eligible for reimbursement in accordance with the rules of the local jurisdiction. Provide the name(s) of the traveler(s), purpose of travel, inclusive dates and times of travel, destination points and travel costs.

5. Training

The cost of training an employee to perform the mandated activities is eligible for reimbursement. Identify the employee(s) by name and job classification. Provide the title and subject of the training session, the date(s) attended, and the location. Reimbursable costs may include salaries and benefits, registration fees, transportation, lodging, expenses and per diem.

B. Indirect Costs

Indirect costs are defined as costs which are incurred for a common or joint purpose, benefiting more than one program and are not directly assignable to a particular department or program without efforts disproportionate to the results achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of central government services distributed to all departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the OMB A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) for the

department if the indirect cost rate claimed exceeds 10%. If more than one department is claiming indirect costs for the mandated program, each department must have its own ICRP prepared in accordance with OMB A-87. An ICRP must be submitted with the claim when the indirect cost rate exceeds 10%.

VI. SUPPORTING DATA

For audit purposes, all costs claimed shall be traceable to source documents (e.g., employee time records, invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, etc.) that show evidence of the validity of such costs and their relationship to the state mandated program. All documentation in support of the claimed costs shall be made available to the State Controller's Office, as may be requested, and all reimbursement claims are subject to audit during the period specified in Government Code, section 17558.5, subdivision (a).

VII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimant experiences as a direct result of the subject mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S OFFICE REQUIRED CERTIFICATION

An authorized representative of the claimant shall be required to provide a certification of the claim, as specified in the State Controller's claiming instructions, for those costs mandated by the State contained herein.

IX. DATA FOR DEVELOPMENT OF THE STATEWIDE COST ESTIMATE

The State Controller is directed to include in the claiming instructions a request that Claimants send an additional copy of the test claim forms for the initial years' reimbursement claims by mail to the Commission on State Mandates, at 1300 I Street, Suite 950, Sacramento, CA 95814. Although providing this information to the Commission on State Mandates is not a condition of reimbursement, Claimants are encouraged to provide this information to enable the Commission to develop a statewide cost estimate which will be the basis for the appropriation to be made by the Legislature for this program.

DECLARATION OF SERVICE

State of California
County of Sacramento

I am at all times herein mentioned, over the age of eighteen years, and not a party to nor interested in the within matter. I am employed by DMG-MAXIMUS, INC. My business address is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841, County of Sacramento, State of California.

That on the 29^{h} day of December, 1999, I served the Draft Parameters and Guidelines by Claimant, City of Sacramento, CMS 4499, Peace Officers Procedural Bill of Rights on the interested parties by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at Sacramento, California, addressed as set forth in the Attachment 1, attached hereto and incorporated herein by reference.

That I am readily familiar with the business practice of DMG-MAXIMUS, INC. for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United State mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 29th day of December, 1999 at Sacramento, California.

Declarant

ATTACHMENT 1

Mr. James Apps
Department of Finance
915 L Street
Sacramento, CA 95814

Mr. Don Benninghoven, Executive Director
CCS Partnership
1100 K Street, Suite 102
Sacramento, CA 95814

Ms. Carol Berg, Ph.D.
Education Mandated Cost Network
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Sacramento, CA 95814

Mr. Paul Minney, Interested Party
Girard & Vinson
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Mr. Andy Nichols
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Mr. Floyd Simomura, Chief Counsel MIC-83
Department of Finance
State Capitol, Rom 1145
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Department of Employee Relations
921-10th Street, Room 601
Sacramento, CA 95814-2711

Mr. Michael Vigliota, Paralegal
Santa Ana Police Department
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Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. David Wellhouse
Wellhouse & Associates
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

STATE OF CALIFORNIA
DEPARTMENT OF FINANCE
915 L STREET
SACRAMENTO, CA 95814-3706

EXHIBIT C

JAN 19 2000

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Dear Ms. Higashi:

We have reviewed the proposed parameters and guidelines for the reimbursement of costs mandated by the "Peace Officer Procedural Bill of Rights (POBOR)," CSM-4499, which were submitted by the City of Sacramento. As the result of that review, we have concluded that most of the proposal is a fair reflection of the Commission's "Statement of Decision" on the test claim which was adopted on November 30, 1999.

There are, however, two areas of concern that we feel should be addressed prior to the Commission's adopting these parameters and guidelines at it's scheduled April 27, 2000 hearing.

- IV. REIMBURSABLE ACTIVITIES
  A. Administrative Activities
  3. Maintenance of the systems to conduct the mandated activities.

  While we agree that these parameters and guidelines should provide a broad context for assessing administrative activities eligible for reimbursement, the claimant's proposed description of this activity appears to be too ambiguous. We recommend that the claimant be requested to specify the types of systems to be included in this mandate (i.e. computer systems, personnel systems, data systems, management systems, etc.)

- IV. REIMBURSABLE ACTIVITIES
  B. On-Going Activities
  1. Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions, *together with the defense of same in any court proceeding.*

  While providing the opportunity for and the conduct of an administrative appeal was included in the Commission's Statement of Decision, there is no reference to the defense

of same in any court proceeding. It is not clear to us that the Commission's approval of the costs of an administrative appeal in its decision necessarily extends to or encompasses judicial review. Unless the claimant can establish a nexus between the two processes, we believe that it is not appropriate to include the costs of the latter in these parameters and guidelines.

If you have any question regarding this letter, please contact Don A. Rascon, Principal Program Budget Analyst at (916) 445-8913 or James D. Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. CALVIN SMITH
Program Budget Manager

PROOF OF SERVICE

Test Claim Name: PEACE OFFICER PROCEDURAL RIGHTS
Test Claim Number: CSM-4499

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On JAN 19 2000, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

League of California Cities
Attention: Ernie Silva
1400 K Street
Sacramento, CA 95815

Mr. Steve Smith, CEO
Mandated Cost Systems
2275 Watt Avenue, Suite C
Sacramento, CA 95825

Mr. Walter Vaughn, Executive Officer
State Personnel Board
801 Capitol Mall, Room 570
Sacramento, CA 95814

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Paul Minney, Interested Party
Girard & Vinson
1676 N. California Boulevard, Suite 450
Walnut Creek, CA 94596

DMG-MAXIMUS
Attention: Allan Burdick
4320 Auburn Boulevard, Suite 2000
Sacramento, CA 95841

Ms. Dee Contreras, Director of Labor Relations
Office of Labor Relations
9210 10th Street, Room 601
Sacramento, CA 95814

City of Sacramento
Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

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1121 L Street, Suite 1060
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Vavrinek Trine Day & Co., LLP
8300 Fair Oaks Blvd, Suite 403.
Carmichael, CA 95608

Mr. James Apps (A-15),
Department of Finance
915 L Street, Room 8020
Sacramento, CA 95814

Mr. Floyd Shimomura, Chief Counsel
Department of Finance
State Capitol, Room 1145
Sacramento, CA 95814

Ms. Elise Rose, Chief Counsel (E-9)
State Personnel Board
801 Capitol Mall, MS-53
Sacramento, CA 95814

Mr. Edward J. Takach
Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

Mr. Michael Vigliota, Paralegal
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60 Civic Center Plaza
Santa Ana, CA 92702

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on JAN 19 2000 at Sacramento, California.

Abby Shawhan

EXHIBIT D

COMMENTS TO DEPARTMENT OF FINANCE
ON DRAFT PARAMETERS AND GUIDELINES
Dated January 19, 2000
By CLAIMANT, CITY OF SACRAMENTO
CSM 4499
Peace Officers Procedural Bill of Rights
Government Code Sections 3300 through 3310

I, Edward J. Takach, state:

I am a Labor Relations Officer for the City of Sacramento. As such, I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

This declaration is submitted in response to the letter of S. Calvin Smith, Program Budget Manager of the Department of Finance to Ms. Paula Higashi, Executive Director of the Commission on State Mandates, dated January 19, 2000.

1. Maintenance of the systems to conduct the mandated activities

With regard to the first part of the letter concerning Administrative Activities, and the maintenance of systems to conduct the mandated activities, it should be noted that, to my knowledge, many public entities maintain administrative files and records on Peace Officers' Bill of Rights (hereinafter "POBR") activities. The files can be located in the personnel department or in the peace officers' department, or both. Some files are maintained manually, while others are retained in a computerized database. Files are also maintained in the offices of the City Attorney or County Counsel for both the provision of advice as well as for subsequent litigation.

Given the various forms in which such administrative records are established and maintained, depending upon the form of public entity, its size, and the numbers of peace officers employed and their departments, this section was left broadly written in order to allow various entities to claim the costs they have incurred, regardless of the method of maintaining administrative records or the location of them.

2. Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions, *together with the defense of same in any court proceeding.*

In its letter, the Department of Finance desires to know whether or not the Commission's decision encompasses judicial review, and desires to know the nexus between the administrative process and judicial review.

First of all, the test claim legislation itself provides that judicial review was contemplated and that original jurisdiction lies in the Superior Court. To that end, Government Code, Section 3309.5, states as follows:

> (a) It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to them by this chapter.
>
> (b) The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against nay public safety department for alleged violations of this chapter.
>
> (c) In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer.

Although at first blush it would seem that only those actions involving a violation by the public entity of the officer's rights under POBR would be subject to judicial review, that is not what has occurred in practice.

The courts have construed the rights of the public safety officer entitle him to independent review of the administrative proceeding by the courts. *See* Fukuda v. City of Angels (1999) 20 Cal 4th 805, at 823-824. This does not mean that the review is unfettered, but the court does independently review both the facts and law as presented in the administrative action. Fukuda at 812. However, the findings of the administrative board come before the superior court with a presumption of correctness and the burden is on the complaining party to convince the court that the decision is contrary to the weight of the evidence. Id.

The effect, however, of the fact that the superior court does review POBR administrative determinations with independent review, encourages employees to file writs in superior court if they believe there is a sufficient probability that a court could reverse an adverse determination of the administrative action. This is particularly true in light of the fact that attorneys fees have been awarded employees pursuant to Code of Civil Procedure, section 1021.5 for actions brought under POBR. *See* Baggett v. Gates 32 Cal.3d 128, 143-144.

Unfortunately, there is more of a nexus between administrative determinations and judicial review than one would wish. Obviously, as these POBR matters would not arise but for the

test claim legislation, any court review of adverse determinations to the employee would not be heard. Consequently, it is requested that the Commission include attorneys fees as a cost eligible for reimbursement.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 23rd day of February, 2000 at Sacramento, California.

Edward J. Takach
Labor Relations Officer

DECLARATION OF SERVICE

State of California
County of Sacramento

I am at all times herein mentioned, over the age of eighteen years, and not a party to nor interested in the within matter. I am employed by DMG-MAXIMUS, INC. My business address is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841, County of Sacramento, State of California.

That on the 23rd day of February, 2000, I served the Comments to Department of Finance on Draft Parameters and Guidelines dated January 19, 2000, by Claimant, City of Sacramento, CMS 4499, Peace Officers Procedural Bill of Rights on the interested parties by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at Sacramento, California, addressed as set forth in the Attachment 1, attached hereto and incorporated herein by reference.

That I am readily familiar with the business practice of DMG-MAXIMUS, INC. for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United State mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 23rd day of February, 2000 at Sacramento, California.

Declarant

ATTACHMENT 1

Mr. James Apps
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Sacramento, CA 95814

Mr. Don Benninghoven, Executive Director
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Sacramento, CA 95814

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Education Mandated Cost Network
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STATE OF CALIFORNIA

COMMISSION ON STATE MANDATES

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EXHIBIT E

May 26, 2000

Ms. Pamela A. Stone
Legal Counsel
DMG Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, California 95841

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: Request for Further Comments, Claimant's Proposed Parameters and Guidelines
Peace Officers Procedural Bill of Rights, CSM-4499
Government Code Sections 3300 through 3311
Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174 and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675
City of Sacramento, Claimant

Request for Further Comments

On May 24, 2000, a pre-hearing conference was held regarding the Proposed Parameters and Guidelines submitted by the claimant. Based on the discussions at the pre-hearing conference, staff requests that further written comments be filed with the Commission on the following reimbursable activities proposed by the claimant:

- Section IV. B. 2: "the review of the necessity for the questioning and responses given" relating to the interrogation of a peace officer;
- Section IV. B. 4: "Producing transcribed copies of any notes made by a stenographer or tape recording at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, whether or not the investigation results in any disciplinary action"; and
- Section IV. B. 5: "preparation of comment and review for accuracy" relating to the receipt of an adverse comment.

Please address in your comments whether the above activities are consistent with, and/or reasonably related to, the Commission's Statement of Decision and the activities mandated by the test claim statutes.

The claimant, state agencies and interested parties may file comments by **June 7, 2000.** Comments received by June 7, 2000 will be considered for the Draft Staff Analysis.

Hearing Schedule

The hearing on the proposed parameters and guidelines is set for **July 27, 2000,** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. Please note the following schedule:

June 7, 2000	File further comments on claimant's Proposed Parameters and Guidelines
June 14, 2000 (tentative)	Issue Draft Staff Analysis
June 30, 2000 (tentative)	File comments to the Draft Staff Analysis
July 14, 2000	Issue Final Staff Analysis
July 27, 2000	Commission Hearing

Please contact me at (916) 323-8215 if you have questions.

Sincerely,

Camille Shelton

CAMILLE SHELTON
Staff Counsel

P:/mandates/4499/526ltr

MAILED: Mail List FAXED:
DATE: 5/26/00 INITIAL: JS
CHRON: FILE:
WORKING BINDER: X

Commission on State Mandates

List Date: 04/03/1996 **Mailing Information** Other

Mailing List

Claim Number CSM-4499 **Claimant** City of Sacramento Test Claim

amending sections 3300-3310

Subject 465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,

Issue Peace Officers Procedural Bill of Rights

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Claim Number CSM-4499 **Claimant** City of Sacramento Test Claim

Subject amending sections 3300-3310

Issue 465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90, Peace Officers Procedural Bill of Rights

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Claim Number CSM-4499 **Claimant** City of Sacramento Test Claim

Subject amending sections 3300-3310
465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,
Peace Officers Procedural Bill of Rights

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RESPONSE TO REQUEST FOR FURTHER COMMENTS
Dated May 16, 2000 and May 26, 2000
By CLAIMANT, CITY OF SACRAMENTO
CSM 4499
Peace Officers Procedural Bill of Rights
Draft Parameters and Guidelines
Government Code Sections 3300 through 3310

I, Dee Contreras, state:

That I am the Director of Labor Relations for the City of Sacramento, which position I have held since November, 1995. From 1990 until November 1995, I was a senior labor relations representative for the City of Sacramento. In these positions, my duties include negotiations with unions pursuant to the Meyers-Milias-Brown Act, contract administration, processing grievances, discipline review for police and fire, as well as miscellaneous employees. Thus, I have been personally responsible for the review of police discipline matters. In these positions, I have been involved in all areas of management labor relations.

I have been involved in the labor relations area since 1980. I was a labor union representative from August of 1980 until June of 1990. I represented employees in disciplinary actions and hearings. I represented and defended the employees and unions in grievances. I negotiated and reviewed civil service rules and their application. I was involved in all aspects of labor relations from the union side for this period of time.

From my substantial experience in representing both labor and management, I am extremely familiar with the *Skelly* process as well as the Peace Officers Procedural Bill of Rights. Additionally, I am an attorney at law admitted to practice in California, having received a J.D. degree from Western State University College of Law, in San Diego in 1979, with honors.

That I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

That I have read letters of May 16, 2000 and May 26, 2000 by Camille Shelton, Staff Counsel, Commission on State Mandates. As labor relations in practice often differs from what one would assume from a bare reading of the law, the questions presented in the two letters are best addressed by reference to actual labor law practice.

1. **The review of the necessity for the questioning and responses given relating to the interrogation of a peace officer.**

It is more difficult to prepare for an investigation involving a peace officer than it is for those who are not entitled to POBR rights. In the normal due process case involving an employee who is not entitled to POBR rights, you do not have to inform the employee about the nature and subject

of the questioning, and you do not have to prepare questions focused upon a particular area, seeking to get the information you can from the employee. In non-POBR matters, you can explore other areas in the questioning as they arise, which allows for a much more free-form questioning process.

In contrast, however, with employees covered by POBR, you must tell the employee prior to the initial questioning what the purpose of the meeting is, what it is you will be discussing with him or her, and you have to be prepared to be clearly on point as to where you are going and your expectations about the questioning process. You cannot engage in broader questioning for information, because the employee has the right to know the subject about which he or she is being interrogated.

POBR rights result in a different type of preparation for the questioning. POBR requires that you prepare not just for the possibility of a hearing and the possibility of preparing allegations or a *Skelly* notice, but you have to focus the questions on what will be the boundaries as to the scope of the questioning of the employee. In all disciplinary matters, when you receive a complaint or allegation of wrongdoing, you have to first find out what all the charges might be, and then speak to the other possible witnesses first. However, with POBR, you must be much more circumspect in preparation.

For example, an actual case situation occurred wherein there was an allegation that an officer failed to handle a particular call properly, that there was the possibility that excessive force was used and the individual was in the hospital. Given the seriousness of the allegations, we commenced speaking with the witnesses immediately. Everyone involved except the complainant, from the officer who was alleged to have used excessive force, as well as his sergeant, was a peace officer covered by POBR. When the sergeant, who was thought to be a witness, came in for questioning, he was informed that the subject of the questioning was one of his subordinate officers. However, in the course of discussions with the sergeant, it became apparent that he failed to file a required form when a person is hospitalized or injured. In Sacramento City, when someone is injured, the sergeant is required to file a form which is an alert to indicate that the arrestee has been hospitalized. In this situation, as you walk through the incident, we became apprized that the sergeant failed to file the required form.

At that point, do you ask the sergeant if he filed the form? Do you stop the process and inform the sergeant that his status has changed from witness to someone being investigated for improper conduct? This is important, because the city initially had not realized that the sergeant had not completed the requisite form, and were asking him about the incident. Thereafter, the city interrogated the officer. When the case was assembled for review by the chain of command, it was clear that the sergeant in question had not completed the requisite form. The supervisor had been interrogated as a witness and not as a potential target for discipline in this matter. Where do you

stand with this situation? Do you go back and re-interview the sergeant at this point, after he has given you the entire story which renders him culpable? POBR complicates the situation.

In the normal due process case, the employee would have uttered statements which indicated that he did not file the appropriate form, you could ask him whether or not he had filed the form, and the issue would be over. However, with POBR, you have to give the sergeant, who was previously called as a witness, a copy of a transcript of his prior testimony as he is entitled to it since he was interrogated on the matter previously in the officer's case. Since you never know when a witness may end up being the subject of discipline, not only do you have to more carefully prepare each case, but you also have to tape record each peace officer's testimony should the eventuality occur that the witness becomes the target of an investigation. This is just an example of why there needs to be more and thorough preparation.

As any peace officer who is a witness in the course of one individual's investigation could become the subject of their own investigation, it is imperative to do more preparation prior to the initial questioning. We now perform a more complete review to ascertain that witnesses who may become subjects are identified prior to interrogation. For obvious reasons, the person who is accused of excessive force may not have documented the use of such force which was the initial reason for creating the incident report. In other words, the playing field is littered with barriers created by POBR which must be addressed and they are different from and in addition to the requirements of due process.

Obviously, if you are going to re-interview a peace officer, you have to be prepared to give them a copy of their prior transcript. You also have to go back and review it, to make sure where you are heading in the second interview. You must focus on whether the testimony corroborates or conflicts with what transpired previously in order to ask intelligent questions. In a non-POBR matter, you can follow up by asking additional questions without regard to the reason you have the employee in for questioning in the first place. However, with POBR, the whole questioning is focused on what you have identified as the allegation. Thus, the definition of what the allegations are must come early in the process. If someone calls to complain about something, the subsequent investigation may bring to light little about the complaint of the citizen, but may demonstrate an internal operating problem or conflict which you have to address. The additional rights granted by POBR make that more difficult as indicated above.

2. <u>Whether a peace officer witness has same POBR rights as the target of the investigation</u>.

Another subject that was raised at the pre-hearing conference was whether a peace officer who is subject to POBR and questioned as a witness has the same rights as the target of the

investigation. In theory, the witness would not have the same protection as an accused who is a peace officer and has been granted POBR rights. However, in the context of what really happens on the street, if there is a complaint about the conduct of a particular officer, if that conduct was witnessed by other officers in their presence, their action or failure to act can result in culpability of the officer who ostensibly were only witnesses. The higher standard of care required of police officers necessitates that they report the wrong-doing of others of which they are aware.

Another example will help to illustrate this issue. We had a situation where there was an allegation that one or more officers were possibly cutting corners to obtain the requisite data to obtain warrants. To the extent that other officers were aware that the warrants were deficient, but they were still being issued by a magistrate and being served, the officers aware of the invalidity of the warrants who failed to report both to the department and to the courts that the officer lied in the warrant would create a separate violation. Thus, when we talk to people who, in the normal world would be witnesses, given the higher standard of conduct required of peace officers, the peace officer witnesses may, in fact, be additionally charged employees in the discipline case. These "witness" employees may not be the primary targets, but are, in essence, "aiders and abettors", in that the failure to report some kind of misconduct by fellow officers is a violation in and of itself. Any time you treat a peace officer as a witness with no other expectation beyond that the person will be only a witness, you do so at your peril. You always have to recognize the potential for further action, and thus it is incumbent on the employer to tape the "witnesses" and treat them as potential targets of investigation.

3. Production of transcribed copies of notes

In a typical due process case not involving an employee covered by POBR, the employee has no right to any material unless disciplinary action is taken. In fact, we routinely refuse to provide information from an investigation if it is determined that we are not going to move forward with discipline. However, with peace officers, they have the right to anything regarding their prior interviews if they are being re-interviewed. In addition, we have been sued on the basis of an alleged violation of POBR. Although the case was settled prior to the decision, the union alleged that the targeted employee has the right to all information, even if no discipline moves forward because the employee has the right to know what was said about them, and the right to review the material for the employee's own independent purposes; in that case to retaliate against the supervisor who filed the complaint.

With due process, there is no right to tape an interview. In fact, the employer cannot tape the questioning without the agreement of the person being questioned. In terms of the right to tape, in this jurisdiction, POBR-covered employees tape the interviews on their own. Obviously, since the employee tapes, we have to tape as well. If a non-POBR employee came in and said they wanted

to tape a meeting, we could refuse and the employee would not have the right to tape. With POBR employees, we cannot refuse the employee the right to tape, and thus we must tape as well.

As I believe was made clear at the original test claim hearing, a tape is meaningless without a transcription. It is unreasonable and unrealistic to think that the process can wait for you to find the two minutes on the tape that you need, when you can simply say "page 8, lines 11-12". It is impossible for me to imagine simply listening to all of the tapes and making a decision based on just listening to them It would be hard to refer between different tapes and interviews for conflicts. Furthermore, the internal integrity of the interrogation really requires that you look at the transcript to compare what was being said later from what was said earlier.

With POBR, the right to tape is that of the peace officer employee. Government Code, Section 3303(g) does not distinguish between taping an officer who is a witness versus taping an officer who is the target of an investigation. The public safety officer, whether or not the target of the investigation, can bring his or her own recording device, and their right to record is independent of our right to record. Where it says *may be* recorded, it in essence requires recording, and doesn't differentiate between interrogation of witnesses and interrogation as the targeted employee. However, because of the fact that "witness" peace officers may subsequently become targets as a result of their heightened standard of conduct, peace officer witnesses must be taped as well. Finally, if you tape all of the peace officers involved in an investigation and do not tape civilian witnesses as well, you do not have a complete record.

Each and every tape made must be transcribed. It is impossible to review a case without a transcript. You would have to listen to the tapes of the charging party, witnesses and the targeted party. Thereafter you are required to consider and resolve conflicts and gaps between stories. It does not work to do this without a transcript. Without a transcript, it is essentially impossible to compare the testimony of the various individuals involved for corroboration or conflict. However, with a transcript, it is possible to flag the transcript where there is a problem as you review it, and you can annotate the record as well. This allows you to easily compare between various interviews and witnesses. There is no reasonable way to listen to 5 tapes serially and then work through the conflicts and corroboration, even if you had 5 playback machines operating at the same time. Additionally, if you did not have a transcript, you would have to create logs of each and every tape, so you would know where to find the information. Each required section would still need research and this complexity renders the process patently unfeasible, and a case would never get through review.

Furthermore, the basic concept of due process is that the employee has notice and an opportunity to respond. The basic concept of just cause in disciplinary matters is that the employee had a fair investigation that led to a decision based on the facts elicited in the investigative process,

not based on extraneous facts, such as whether you like the person targeted or not. If there were no transcripts, and one had to listen to tapes serially, there is the possibility of no discipline, as you would not be able to easily review the tapes. The other problem which arises is subjective discipline, because you are not able to distinguish between the stories of the charged employee and the witnesses, and your action would be based upon your visceral response to the tapes, especially the first and last you had listened to. In addition, tapes play at real time, whereas reading is much faster. When you have a case with 200 plus interviews and have 80 hours of tapes, it could take months to listen to the tapes and try to sort out the facts. However, with transcripts, you can mark them with color coded flags for different charges, and it would likely take 20% of the time it would otherwise take.

With POBR, we tape civilians as witnesses as well, so that the record is clean. Since you are taping the sworn staff, you invalidate the integrity of the total process if you do not tape the civilian individuals. In my experience, outside of the POBR situation, it is extremely rare that a department would tape an investigation.

When the discipline letter is issued, we include transcripts of everyone interviewed whose statement were used in taking the disciplinary action.. If there is a confidential person who was interviewed, who adds nothing to the investigation and we will not use them as a witness, we may not give the targeted employee that transcript. But, typically, the employee gets a copy of every transcript, including their own.

4. **Issue of adverse comment**

An employee covered by POBR has the right to respond to information which is not disciplinary. Thus, the employee has the right to complain about something that other employees would not even deal with. As an example, if an employee has a backlog problem, the employee would be provided a memorandum identifying the backlog, a copy of which would be sent to the personnel file. The memo would basically state that these particular items are backed up and need to be addressed. The purpose of the memorandum is not intended to result in discipline. It is merely counseling or direction from the supervisor in terms of workflow. It can certainly be viewed as an adverse comment, because it is not commending the employee on the wonderful job that was performed. The employee thus, under POBR, is given the ability to spend whatever time he or she chooses to respond to it.

To illustrate this, I handled a case which arose in another department and which is illustrative. The agency did a performance evaluation on a form which is particularly detailed, being 6 pages long with check boxes and room for narrative. There was a lot of narrative in the performance evaluation which indicated that the person had problems. In response to the

performance evaluation, the employee wrote 37 typed, single-spaced pages, asking 1,000 questions. Each issue in the evaluation evoked questions such as "When did I do that?" and "Who said that I did that?" These types of questions were asked about every facet of the evaluation. In this matter, when I received the comment from the employee, I took the matter home and read it, and then called the agency and said this is how I would respond. "Dear "X", I have received your response to your performance evaluation. It has been filed." I suggested that the letter be treated as a rebuttal document and placed in the personnel file. From my perspective, anyone examining the file would quickly ascertain that this was not a model employee. However, once the letter was written and filed, the employee started writing letters to ask why we were ignoring all of the questions he had raised.

With the provision for comment upon adverse comments, you are giving the employee the opportunity to respond to negative information, and this is an open invitation for anarchists (defined as employees who will paper the employer to death) to attempt to wreck havoc with the process, and cause problems for their supervisors. As a result, because the opportunity does exist, some employees use it as a means of "getting" their supervisors.

5. **Issue of legal review**

The issue of the necessity for legal review and reimbursement for defense of litigation has been raised by both the Department of Finance and the Commission's staff. Hopefully my experience will help shed light on the necessity for legal review and the necessity to defend decisions in litigation.

There are two issues which necessitate legal review: making sure that we are in compliance with POBR, and to make sure decisions are defensible. The necessity for legal review may not be as necessary if the investigation is taking place within the police department, as the individuals within the department have had more extensive training in POBR. However, if the investigation goes outside the department, others may not have had the training in the intricacies of POBR, which could result in liability for the employer. It is imperative in order to be in compliance, to know all of the intricacies of POBR. They are myriad, changing and expanding. For example, ten years ago, administrative review meant that someone within the administration reviewed the matter. The courts have expanded this to mean a full due process hearing.

Managers are not necessarily aware of the various court decisions that change and reinterpret POBR. If you are not continually involved in POBR matters, you may know what the act looked like the last time you were subject to it, but not necessarily what it looks like at present. Non-attorneys don't look at legal advance sheets to see if there are cases which make something new and exciting in the world of POBR. From the most simplistic standpoint, you need to make sure you are

in compliance with POBR. As I am not only the Director of Labor Relations but also an attorney, the City of Sacramento may not need as much review as other governmental entities. But, as the penalty for failure to comply, which is to defeat the employer's contemplated action, may have far reaching repercussions, it is imperative that compliance be had.

The second reason is to make sure that, from a litigation protection standpoint, our attorneys are comfortable with the decisions we are making in regard to matters covered by POBR, as they may have to defend them. While attorneys in the City do not determine the level of discipline and policy issues which may be involved, if we are sued, they are the ones who have to defend the action. They must be included and brought on board early in the process, to make sure from a litigation perspective we are not walking into quicksand that will make it more difficult to protect ourselves.

POBR has been substantially expanded by case law. To some extent, protections have been strengthened by amendments to the act, which was clearly intended to protect the employee against the abuse of the employer. However, the situation has reached the point where POBR can be abusive to the employer. You must worry about and concern yourself with POBR issues which have not yet been adjudicated. If the union or employee doesn't like what you are doing and how you are handling something, they can simply opt to litigate the matter and seek to have the law expanded to further abrogate management rights. Furthermore, unions and employees have been pretty successful at extending the reach of POBR. Because there is no oversight body that enforces POBR except the courts, as the employer you are at the mercy of the courts. There is no real essence of constancy in the expectations between various state jurisdictions, and each judge rules based on his or her own standard of right and wrong. Few superior court judges, and fewer appellate court judges, have had any experience in labor law, thus they often try to interpret labor provisions in the context of traditional contract law, which does not help the situation at all.

Courts have been more than willing, in most cases, to expand the penumbra of the act. The courts continually add pieces to it, or strengthen it in terms of what their expectations are. Originally, POBR was an administrative process or review, to ensure that peace officers were not receiving less than other employees in terms of some kind of protection, particularly in light of their heightened responsibility. However, POBR has become a due process right in a range of areas that would never be afforded any other employee.

As experienced in real situations, the employee will first raise an allegation of a POBR violation to see if he or she can pressure you into changing your decision. You have a management right to move or reassign people. An extreme case like this occurred when we had a unit of officers who were engaged in marginal behavior relative to the courts in terms of falsifying affidavits for the issuance of warrants. When we discovered this, we wanted to pull these individuals out of their

assignments and put them somewhere where these employees could do substantially less harm while the allegations were investigated. The courts have agreed that we could do this. There is some irony in that we could take all those people and put them on paid administrative leave at home. However, it is a POBR violation to move them from one assignment to another over their objections if the employee sees it as a punitive measure. From a management perspective, it is insane to leave employees in this position during the investigation, but that was the message. It is absolutely stupid: we can pay them to stay at home, but we can't move them because a punitive transfer is covered under POBR.

Another example that demonstrates the problem of how POBR violation allegations may arise from employees and their unions arose in a budget reduction, arguably layoff, process. When we did staff reductions as a result of the 1992 budget, we eliminated 2 units in investigations, which is a specific assignment which also has additional detective pay. Basically, we implemented the staff reductions as though it were a layoff: we took the less senior people and moved them out of the units, being a total of approximately 2 sergeants and 8 officers. The employees raised all kinds of objections to their transfers generally, and specifically to loss of detective pay, even though the collective bargaining agreement says that detective pay is assignment pay for working in detectives and investigations and is not subject to POBR.

When we transferred these individuals out of investigations due to elimination of the 2 units, in what should be viewed as an absolute management right to determine the number of people who do a specific job, and even though the collective bargaining agreement says that loss of detective pay is not covered by POBR, because the transfer would actually involve the loss of pay it was alleged that the transfers were punitive and the SPOA union threatened us with litigation. It did not make any difference that the reason for the elimination of the 2 units was budgetary and that it was done on the basis of seniority. If we had removed individuals from the units on other than the basis of seniority it clearly would have been individualized and based on merit, thus arguably triggering POBR as it could reflect on the individual employee. However, POBR created an opportunity out of thin air and made it more difficult and expensive to accomplish this reallocation of personnel. The City ultimately paid the employees detective pay for an additional 4 to 6 months after the employees were transferred in order to avoid costly and protracted litigation with an uncertain outcome, which could have had financially ruinous results at a time when budget cuts generated the action in the first place.

Litigation is easily brought by employees and their unions involving actions which are alleged to be violations of POBR, sometimes for purely tactical reasons. It is not necessary that there have in actuality been a violation of POBR for one to be alleged. Between tactical reasons and a desire to expand the protections afforded to employees, litigation in this area is rampant. In order to preserve the right of the employer to appropriately manage the department and preserve

management rights, it is imperative that these actions be defended and they arise as a direct consequence of the legislation itself.

6. Overtime requests

Since the police department is a 24 hour, seven day a week operation, someone is always going to be off from their regular work, which means that an interview will frequently be subject to overtime pay. Whenever possible, we try and pay the overtime to the interviewing staff, and not the person being investigated. However, if the person is placed on administrative leave, which is time when the person is not allowed to work on the premises but is being paid, we do change the shift to days to avoid these additional costs. Changing the shift may ignite allegations of POBR violation due to the requirement to interview on their regular shift/awake time. One individual placed on administrative leave who worked a shift other than days, objected and said it was a violation as his change in shift was punitive and a violation of POBR. In order to address this type of complaint, we have ended up leaving the employee on his evening shift on administrative leave, but requiring that he call in and report several times an hour throughout his shift.

Regarding Government Code Section 3303(a), we typically try to question officers when they are on duty. If the allegations are very serious, we do place them on administrative leave. If the allegation is such that if it were true we would terminate the individual, we place that person on administrative leave at the commencement of the process. In many cases, it is not clear that the problem is serious until you have interviewed several individuals. However, if the charges are such that you are likely to terminate the employee, and the employee is aware of that fact, the employee can wreck an enormous amount of havoc in the workplace. As a result, that person is placed on paid administrative leave to make sure he or she is not in the workplace.

7. Conclusion

I intend to be present at the Commission's hearing of July 27, 2000, and will be happy to address any issues or questions about the practical application of this law.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 7th day of June, 2000 at Sacramento, California.

Dee Contreras

Dee Contreras

DECLARATION OF SERVICE

State of California
County of Sacramento

I am at all times herein mentioned, over the age of eighteen years, and not a party to nor interested in the within matter. I am employed by DMG-MAXIMUS, INC. My business address is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841, County of Sacramento, State of California.

That on the 7th day of June, 2000, I served the Response to Request for Furhter Comments dated May 16, 2000 and May 26, 2000, by Claimant, City of Sacramento, CMS 4499, Peace Officers Procedural Bill of Rights on the interested parties by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at Sacramento, California, addressed as set forth in the Attachment 1, attached hereto and incorporated herein by reference.

That I am readily familiar with the business practice of DMG-MAXIMUS, INC. for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United State mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 7th day of June, 2000 at Sacramento, California.

Declarant

ATTACHMENT 1

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance
915 L Street, Room 8020
Sacramento, CA 95814

Mr. Don Benninghoven, Executive Director
CCS Partnership
1100 K Street, Suite 102
Sacramento, CA 95814

Ms. Carol Berg, Ph.D.
Education Mandated Cost Network
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Sacramento, CA 95814

Mr. Paul Minney, Interested Party
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1676 N. California Blvd., Suite 450
Walnut Creek, CA 94596

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State Personnel Board
801 Capitol Mall, MS-53
Sacramento, CA 95814

Mr. Floyd Simomura, Chief Counsel MIC-83
Department of Finance
State Capitol, Rom 1145
Sacramento, CA 95814

Mr. Edward J. Takach, Labor Relations Officer
Department of Employee Relations
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Sacramento, CA 95814-2711

Mr. Michael Vigliota, Paralegal
Santa Ana Police Department
City Attorney's Office
60 Civic Center Plaza
Santa Ana, CA 92702

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. David Wellhouse
Wellhouse & Associates
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Ms. Marcia C. Faulkner, Manager, Reimbursable Projects
County of San Bernardino
Office of the Auditor/Controller
222 W. Hospitality Lane, 4th Floor
San Bernardino, CA 92415-0018

Ms. Connie Peters
Youth & Adult Correctional Agency
1100 11th Street, 4th Floor
Sacramento, CA 95814

State of California

Kathleen Conn EXHIBIT G

emorandum

To : Camille Shelton
Staff Counsel
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Date: June 14, 2000

From : **State Controller's Office**
Paige V. Vorhies, Chief
Bureau of Payments

Subject: Comments on Claimant's Proposed Parameters and Guidelines
Peace Officers Procedural Bill of Rights, CSM-4499
Government Code Sections 3300 through 3311
Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775,1173,1174 and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675
City of Sacramento, Claimant

At the May 24, 2000, pre-hearing conference at your office, you requested comments on the above subject.

We suggest the following language be added to the parameters and guidelines under VI. Supporting Data:

Number of cases in process at the beginning of the fiscal year _____
Number of new cases added during the fiscal year _____
Number of cases completed or closed during the fiscal year _____
Number of cases in process at the end of the fiscal year _____

Claimants would provide this information to validate the quantity of work performed for which costs are claimed. In addition, collection of this data would be valuable for use in a future conversion of the existing actual costs reimbursement methodology to a unit rate basis.

If there are any questions, I can be reached at telephone (916) 323-2199.

PVV:joy

Enclosure: Mailing List

PROOF OF SERVICE BY MAIL

CSM - 4499

I, the undersigned, declare as follows:

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of 18 years and not a party to the within action. My place of employment and business address is 3301 C Street, Suite 500, Sacramento, California 95816.

On June 14, 2000, I served the attached recommendation of the State Controller's Office by placing a true copy thereof enclosed in a sealed envelope addressed to each of the persons named below at the addresses shown and by depositing said envelopes in the United States mail at Sacramento, California, with postage thereon fully prepaid.

Mr. Paige Vorhies
State Controller's Office
Division of Accounting and Reporting
301 C Street, Suite 500
Sacramento, CA 95816

Mr. James Apps
Department of Finance
915 L Street
Room 8020
Sacramento, CA 95814

Mr. Don Benninghoven
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CCS Partnership
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Mr. Allan Burdick
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Cost Recovery Systems
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Interested Party
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Ms. Elise S. Rose
Chief Counsel
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Mr. Floyd Shimomura
Chief Counsel, MIC-83
department of Finance
State Capitol, Room 1145
Sacramento, CA 95814

Mr. Edward J. Takach
Labor Relations Officer
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921 10th Street, Room 601
Sacramento, CA 95814-2711

Mr. Michael Vigliota, Paralegal
Santa Ana Police Department
City Attorney's Office
60 Civic Center Plaza
Santa Ana, CA 92702

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2000, at Sacramento, California.

Emelda M. Lowi-Teng

STATE OF CALIFORNIA

EXHIBIT H

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
IE: (916) 323-3562
(916) 445-0278
ail: csminfo@csm.ca.gov

June 20, 2000

Ms. Pamela A. Stone
Legal Counsel
DMG Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, California 95841

And Affected State Agencies and Interested Parties (See Attached Mailing List

RE: Draft Staff Analysis and Claimant's Proposed Parameters and Guidelines as Modified by Staff (July 27, 2000 Hearing)
Peace Officers Procedural Bill of Rights, CSM-4499
Government Code Sections 3300 through 3311
Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174 and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675
City of Sacramento, Claimant

The draft staff analysis and Claimant's Proposed Parameters and Guidelines, as Modified by Staff, are complete and enclosed for your review and comment. The hearing on the parameters and guidelines is set for July 27, 2000.

Written Comments
Any party or interested person may file written comments on the draft staff analysis and the Claimant's Proposed Parameters and Guidelines, as Modified by Staff, by July 5, 2000. Please be advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list and accompanied by a proof of service on those parties.

Hearing
The hearing on the parameters and guidelines is set for July 27, 2000 at 9:30 in Room 126 of the State Capitol, Sacramento, California. If you would like to request a postponement of the hearing, please refer to section 1183.01(c) of the Commission's regulations.

Please contact Camille Shelton, Staff Counsel, with questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

c. Mailing List
Enc.

MAILED: Mail List FAXED:
DATE: 6/21/00 INITIAL: JS
CHRON: FILE: X
WORKING BINDER:

ITEM # ___

DRAFT PROPOSED PARAMETERS AND GUIDELINES

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Executive Summary

[To be completed for Final Staff Analysis]

Summary of the Mandate

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights (POBAR).

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees), and peace officers on probation who have not reached permanent status.

On November 30, 1999, the Commission adopted its Statement of Decision that the test claim legislation constitutes a partial reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 (Exhibit __).

Background

On December 29, 1999, the claimant, the City of Sacramento, submitted proposed parameters and guidelines on the mandated program (Exhibit __). The claimant's proposed parameters and guidelines were mailed to interested parties for review and comment. On January 19, 2000, the Commission received written comments from the Department of Finance (Exhibit __). On February 23, 2000, the claimant filed a response to the Department of Finance's comments (Exhibit ___). On May 24, 2000, a pre-hearing conference was conducted at the request of the claimant. Following the pre-hearing conference, staff requested further comments from the claimant, state agencies and interested parties (Exhibit ___). On June 7, 2000, the claimant responded to staff's request

(Exhibit __). On June 14, 2000, the State Controller's Office submitted comments requesting that specified language be added to Section VI., Supporting Data, in order to validate the quantity of work performed (Exhibit ___). No other written comments have been received.

STAFF ANALYSIS

Staff reviewed the claimant's proposed parameters and guidelines and the comments submitted by the parties. Staff has modified the claimant's proposed parameters and guidelines, as reflected by underline and strikeout, to conform the parameters and guidelines to the test claim legislation and the Commission's Statement of Decision. (See page __).

The main issues in dispute concern the activities listed in Section IV. Reimbursable Activities. Staff's modifications to this section are described below.

Section IV. (A), Administrative Activities

The claimant's proposed parameters and guidelines include the following administrative activities:

> "1. Developing or updating policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities.
>
> 2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate.
>
> 3. Maintenance of the systems to conduct the mandated activities.
>
> 4. Providing direct supervision over the agency staff performing the mandated activities."

The Department of Finance states that "maintenance of the systems to conduct the mandated activities" is too ambiguous. Staff agrees.

Before the test claim legislation was enacted, local law enforcement agencies were conducting investigations, issuing disciplinary actions, and *maintaining* files for those cases. Thus, "maintenance of the systems to conduct the mandated activities" is too broad. Accordingly, staff has modified this component to provide that claimants are eligible for reimbursement for "updating the status report of the POBAR cases."

Staff has also modified the claimant's proposed parameters and guidelines by striking the proposed activity of "providing direct supervision over the agency staff performing the mandated activities." If a claimant is requesting reimbursement for an employee providing direct supervision regarding the mandated activities, the claimant simply has to comply with Section V., Claim Preparation and Submission, and submit supporting documentation to the Controller's Office identifying the employee, describing the reimbursable activities performed, and the actual time devoted to the mandated activity. Thus, adding a separate component in Section IV. for employee supervision is duplicative and not necessary.

Finally, staff has designated the administrative activities as on-going activities. Due to a lack of specificity in the test claim legislation, hundreds of court cases have been, and continue to be issued. The case law has provided new interpretations of the legislation and clarified the responsibilities of local agencies. Thus, staff finds that it is reasonably necessary for local agencies to update their internal policies and procedures, and train their employees on an on-going basis.

Thus, staff's modifications to Section IV. (A), are as follows:

"A. Administrative Activities (On-going Activities)

1. Developing or updating internal policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities.

2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate.

3. ~~Maintenance of the systems to conduct the mandated activities.~~ Updating the status report of the POBAR cases.

~~4. Providing direct supervision over the agency staff performing the mandated activities.~~"

Section IV. (B), Administrative Appeal

The Commission's Statement of Decision includes a list of activities the Commission found to be reimbursable under article XIII B, section 6 of the California Constitution. The first activity listed in the Statement of Decision states the following:

"Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interests *are not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee."

The claimant's proposed parameters and guidelines includes the language provided above, but also adds the following italicized phrase: "Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions, *together with the defense of same in any court proceeding*." Thus, the claimant is requesting attorneys' fees, witness fees, and all associated court costs in defense of its case.

The Department of Finance contends that legal defense costs are not reimbursable. They state the following:

> "While providing the opportunity for and the conduct of an administrative appeal was included in the Commission's Statement of Decision, there is no reference to the defense of same in any court proceeding. It is not clear to us that the Commission's approval of the costs of an administrative appeal in its decision necessarily extends to or encompasses judicial review. Unless the claimant can establish a nexus between the two processes, we believe that it is not appropriate to include the costs of the latter in these parameters and guidelines."

In response, the claimant cites Government Code section 3309.5, a statute included in the test claim legislation, to assert that the test claim legislation gives the superior court

original jurisdiction over any proceeding brought by a peace officer for alleged POBAR violations.

Government Code section 3309.5 states the following:

> "(a) It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to them by this chapter.
>
> (b) The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this chapter.
>
> (c) In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer."

The claimant also states that "although at first blush it would seem that only those actions involving a violation by the public entity of the officer's rights under POBAR would be subject to judicial review, that is not what has occurred in practice." The claimant, citing the case of *Fukuda* v. *City of Angels*[1], contends that the courts have expanded the judicial review of POBAR cases to an independent review of the validity of the final administrative decision. The claimant therefore asserts that reimbursement should be required for all costs related to defending the agency's final administrative decision in court.

Staff disagrees with the claimant. The *Fukuda* case, cited by the claimant, involves an administrative mandamus proceeding under Code of Civil Procedure section 1094.5 brought by a police officer against his employer following the employer's final decision to discharge the plaintiff. A writ of mandamus proceeding under Code of Civil Procedure section 1094.5 is available to review "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." Thus, the plaintiff in *Fukuda* was attacking the validity of the employer's final decision of discharge.

The plaintiff in *Fukuda*, however, did *not* allege any POBAR violations. In fact, the test claim legislation is not even mentioned in the case. The plaintiff was simply contesting the final disciplinary action taken by the employer. Thus, staff finds that the *Fukuda* case is not relevant here.

Moreover, even *before* POBAR was enacted, a peace officer could file a court action under Code of Civil Procedure section 1094.5 attacking the validity of the agency's final disciplinary decision.[2] A peace officer can also file a civil suit for damages as a result of an agency's disciplinary action *even in the absence of POBAR*. Thus, defending such lawsuits is not new.

---

[1] *Fukuda* v. *City of Angels* (1999) 20 Cal.4th 805. (Exhibit ___.)

[2] Code of Civil Procedure section 1094.5 was originally added by the Legislature in 1945 (Stats. 1945, ch. 358).

Accordingly, staff finds that defending a lawsuit attacking the validity of the final disciplinary action does not constitute a reimbursable a state mandated activity.

Staff also finds that activities resulting from Government Code section 3309.5 cannot be included in the parameters and guidelines because the Commission has not made a test claim finding that section 3309.5 constitutes a reimbursable state mandate under article XIII B, section 6 of the California Constitution. That section gives the superior court original jurisdiction over proceedings alleging that a local agency has violated a peace officer's POBAR rights. Section 3309.5 was specifically designed to allow a peace officer to pursue a remedy immediately in the courts *during* the investigation and not require that the officer wait until after the administrative appeal.[3] Although section 3309.5 is part of POBAR, the claimants never alleged during the test claim hearing, or in response to the Commission's Statement of Decision, or during the hearing on the Statement of Decision that section 3309.5 imposes reimbursable state mandated activities.[4]

Accordingly, staff has modified the claimant's proposed parameters and guidelines by striking out the words "together with the defense of same in any court proceeding."

In addition, staff has included the Commission's recognition that Government Code section 3304 was amended in 1998 (Stats. 1998, ch. 748) to limit the right to an administrative appeal to the chief of police and those employees who have successfully completed probation. (See page 10 of the Statement of Decision.) The amendments became effective on January 1, 1999. Thus, claimants are eligible for reimbursement for providing the opportunity for an administrative appeal to probationary and at-will employees, except the chief of police, only until December 31, 1998.

Thus, staff has modified Section IV. (B) as follows:

"B. ~~On-Going Activities~~ Administrative Appeal

1. Reimbursement period of July 1, 1994 through December 31, 1998 – The administrative appeal activities listed below apply to permanent employees, at-will employees, and probationary employees.

   ~~1.~~ Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions, ~~together with the defense of same in any court proceeding~~ (Gov. Code, § 3304, subd. (b)):

   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

---

[3] See, *Mounger* v. *Gates* (193 Cal.App.3d 1248, 1256 (Exhibit ___).

[4] Exhibit ___, Test claim filings submitted by the claimant, August 26, 1999 Hearing Transcript (test claim hearing), November 30, 1999 Hearing Transcript (SOD hearing).

Included in the foregoing~~, but not limited thereto,~~ are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.

2. Reimbursement period beginning January 1, 1999 – The administrative appeal activities listed below apply to permanent employees and the Chief of Police

—Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

- Dismissal, demotion, suspension, salary reduction or written reprimand received by the Chief of Police whose liberty interest is not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent employees for purposes of punishment;
- Denial of promotion for permanent employees for reasons other than merit; and
- Other actions against permanent employees or the Chief of Police that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Included in the foregoing are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body."

Section IV. (C), Interrogations

The Commission found that several activities required by the test claim legislation involving the interrogation of a peace officer constituted reimbursable state mandated activities. (See the Commission's Statement of Decision, pages 25 and 26.)

The claimant contends that all of the interrogation activities found by the Commission to be reimbursable apply not only to the peace officer employee under investigation, but also to civilian and peace officer witnesses. For example, the claimant states the following:

> "Government Code Section 3303(g) does not distinguish between taping an officer who is a witness versus taping an officer who is the target of an investigation. The public safety officer, whether or not the target of the investigation, can bring his or her own recording device, and their right to record is independent of our right to record. Where it says *may* be recorded, it in essence requires recording, and doesn't differentiate between interrogation of witnesses and interrogation as the targeted employee. However, because of the fact that 'witness' peace officers may subsequently become targets as a result of their heightened standard of conduct, peace officer witnesses must be taped as well. Finally, if you

tape all of the peace officers involved in an investigation and do not tape civilian witnesses as well, you do not have a complete record."[5]

Government Code section 3303, which addresses investigations and interrogations, expressly states in the first paragraph that the rights granted with regard to interrogations apply only when a peace officer is under investigation that could lead to punitive action. The first paragraph of section 3303 states in pertinent part the following:

> "*When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action* [defined in the test claim legislation as dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment], the interrogation shall be conducted under the following conditions." (Emphasis added.)

Thus, based on the language of section 3303, staff finds that the rights granted by POBAR, including the right to tape an interrogation, do *not* extend to civilian witnesses.

However, staff agrees with the claimant that POBAR rights under Government Code section 3303 do attach when a peace officer is interrogated as a witness to an incident since the officer's own actions regarding the incident can result in punitive action. The claimant provides the following example:

> For example, an actual case situation occurred wherein there was an allegation that an officer failed to handle a particular call properly, that there was the possibility of excessive force was used and the individual was in the hospital. Given the seriousness of the allegations, we commenced speaking with the witnesses immediately. Everyone involved except the complainant, from the officer who was alleged to have used excessive force, as well as his sergeant, was a peace officer covered by POBR. When the sergeant, who was thought to be a witness, came in for questioning, he was informed that the subject of the questioning was one of his subordinate officers. However, in the course of discussions with the sergeant, it became apparent that he failed to file a required form when a person is hospitalized or injured. In Sacramento City, when someone is injured, the sergeant is required to file a form which is an alert to indicate that the arrestee has been hospitalized. In this situation, as you walk through the incident, we became apprized that the sergeant failed to file the required form."
>
> "....."
>
> "In the normal due process case, the employee would have uttered statements which indicated that he did not file the appropriate form, you could ask him whether or not he had filed the form, and the issue would be over. However, with POBR, you have to give the sergeant, who was previously called as a witness, a copy of the transcript of his prior testimony as he is entitled to it since he was interrogated on the matter previously in the officer's case. Since you never know when a witness may end up being the subject of discipline, not only do you have to more carefully prepare each case, but you may also have to tape record each

[5] Exhibit ___.

peace officer's testimony should the eventuality occur that the witness becomes the target of an investigation. This is just an example of why there needs to be more and thorough preparation."

"As any peace officer who is a witness in the course of one individual's investigation could become the subject of their own investigation, it is imperative to do more preparation prior to the initial questioning. We now perform a more complete review to ascertain that witnesses who may become subjects are identified prior to interrogation."[6]

Thus, staff has added the following paragraph to Section IV. (C) of the proposed parameters and guidelines:

"Claimants are eligible for reimbursement for the performance of the activities listed in this section only when a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)"

Staff has also added the following paragraph, which was included on page 12 of the Commission's Statement of Decision and expressed in Government Code section 3303, subdivision (i):

"Claimants are not eligible for reimbursement when an interrogation of a peace officer is in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer. Claimants are also not eligible for reimbursement when the investigation is concerned solely and directly with alleged criminal activities. (Gov. Code, § 3303, subd. (i).)"

Section IV. (C) (1) and (2), Compensation and Timing of an Interrogation, Interrogation Notice

The Commission's Statement of Decision includes the following reimbursable activity:

"Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)"

This activity was derived from Government Code section 3303, subdivision (a), which establishes the timing and compensation of a peace officer subject to an interrogation. Section 3303, subdivision (a), requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the normal waking hours of the peace officer, unless the seriousness of the investigation requires otherwise. At the test claim phase, the claimant contended that this section resulted in the payment of overtime to the peace officer employee. (See page 12 of the Commission's Statement of Decision.)

The claimant's proposed parameters and guidelines restates the activity as expressed in the Statement of Decision, but also adds "the review of the necessity for the questioning and

[6] Exhibit ___, pages 2 and 3.

responses given" as a reimbursable component. The claimant's proposed parameters and guidelines state the following:

> "Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
>
> "Included in the foregoing, but not limited thereto, is the *review of the necessity for the questioning and responses given*; providing notice to all parties concerned of the time and place of the interview and scheduling thereof; preparation and review of overtime compensation requests; review of proceedings by counsel." (Emphasis added.)

Following the pre-hearing conference in this case, staff requested further comments on the proposed activity "to review the necessity for the questioning and responses given" to determine if the activity was consistent with, and/or reasonably related to, the Commission's Statement of Decision and the activities mandated by the test claim legislation.

In response to staff's request, the claimant asserts that it is more difficult to prepare for an investigation under POBAR because Government Code section 3303, subdivision (c), requires that the employee receive prior notice identifying the nature and subject of the questioning. The claimant states the following:

> "It is more difficult to prepare for an investigation involving a peace officer than it is for those who are not entitled to POBR rights. In the normal due process case involving an employee who is not entitled to POBR rights, you do not have to inform the employee about the nature and subject of the questioning, and you do not have to prepare questions focused upon a particular area, seeking to get the information you can from the employee. In non-POBR matters, you can explore other areas in the questioning as they arise, which allows for a much more free-form questioning process."
>
> "In contrast, however, with employees covered by POBR, you must tell the employee prior to the initial questioning what the purpose of the meeting is, what it is you will be discussing with him or her, and you have to be prepared to be clearly on point as to where you are going and your expectations about the questioning process. You cannot engage in broader questioning for information, because the employee has the right to know the subject about which he or she is being interrogated."[7]

The claimant further states the following:

> "As any peace officer who is a witness in the course of one individual's investigation could become the subject of their own investigation, it is imperative to do more preparation prior to the initial questioning. We now perform a more complete review to ascertain that witnesses who may become subjects are identified prior to interrogation. . . ."
>
> "Obviously, if you are going to re-interview a peace officer, you have to be prepared to give them a copy of their prior transcript. You also have to go back and review it, to make sure where conflicts with what transpired previously in order to ask intelligent questions. In a non-POBR matter,

[7] Exhibit, pages 1 and 2.

you can follow up by asking additional questions without regard to the reasons you have the employee in for questioning in the first place. However, with POBR, the whole questioning is focused on what you have identified as the allegation. Thus, the definition of what the allegations are must come early in the process. If someone calls to complain about something, the subsequent investigation may bring to light little about the complaint of the citizen, but may demonstrate an internal operating problem or conflict which you have to address. The additional rights granted by POBR make that more difficult as indicated above."[8]

Staff finds that the activity to review the necessity for the questioning and responses given is too broad and goes beyond the scope of Government Code section 3303, subdivision (a), and the Commission's Statement of Decision.

Government Code section 3303, subdivision (a), addresses only the compensation and timing of the interrogation. It does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review the responses given by the officers and/or witnesses, as implied by the claimant's proposed language. Certainly, local agencies were performing these investigative activities before POBAR was enacted.

Nevertheless, Government Code section 3303, subdivision (c), does impose a new requirement on local agencies to provide the peace officer with notice identifying the nature of the investigation prior to the interrogation. The Commission found that the notice requirement constituted a reimbursable state mandated activity under article XIII B, section 6 of the California Constitution. Accordingly, staff finds that the activity of reviewing agency complaints or other documents to prepare the notice of interrogation is a reasonable method of complying with the Government Code section 3303, subdivision (c).[9]

Based on the foregoing, staff has modified Section IV. (C) as follows:

"1. ~~Conducting an interrogation of a peace officer while the officer is on duty, or compensating~~ When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

Included in the foregoing~~, but not limited thereto,~~ is the ~~review of the necessity for the questioning and responses given; providing notice to all parties concerned of the time and place of the interview and scheduling thereof~~; preparation and review of overtime compensation requests~~; review of proceedings by counsel~~.

2. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)

Included in the foregoing~~, but not limited thereto,~~ is the review of agency complaints or other documents to prepare the notice of interrogation; ~~the nature of the interrogation; review by counsel;~~ determination of the investigating officers; redaction of the agency complaint for names of the complainant or other accused

[8] Id. at page 3.

[9] Section 1183.1 of the Commission's regulations provides that the parameters and guidelines shall provide a "description of the most reasonable methods of complying with the mandate."

parties or witnesses or confidential information; ~~and~~ preparation ~~and presentation to officer~~ of notice or agency complaint; review by counsel; and presentation of notice or agency complaint to peace officer."

Section IV. (C) (3), (4), and (5), Tape Recording and Transcription of the Interrogation

Government Code section 3303, subdivision (g), states the following:

> "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation."

The Commission found that Government Code section 3303, subdivision (g), imposed the following reimbursable state mandated activities (see pages 25 and 26 of the Statement of Decision):

- Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)
- Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):
  - (a) The further proceeding is not a disciplinary action;
  - (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);
  - (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;
  - (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;
  - (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.
- Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):
  - (a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

The claimant's proposed parameters and guidelines combine these activities into one paragraph:

> "Producing transcribed of any notes made by a stenographer or tape recording at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, *whether or not the investigation results in any disciplinary action.* (Gov. Code, § 3303, subd. (g)).
>
> Included in the foregoing, but not limited thereto, is the review of the complaints, notes or tape recordings for issues of confidentiality by law enforcement, human relations or counsel; cost of tape copying, tape and storage; cost of transcription, processing, service and retention of copies." (Emphasis added.)

Staff finds that the claimant's proposed paragraph, which authorizes reimbursement for the cost of transcription and tape recording *whether or not the investigation results in any disciplinary action,* is inconsistent with the Commission's Statement of Decision.

First, the proposed paragraph implies, and the claimant requests, reimbursement for taping *all* interrogations. However, the Commission found that reimbursement is required for tape recording the interrogation *only when* the employee tapes the interrogation.

The Commission also limited the right to reimbursement for the costs of providing the employee with access to the tape or transcription of the notes when: (1) the investigation did not result in disciplinary action; and 2) when the disciplinary action did not involve a pre-existing due process right to such materials.

Thus, staff has modified the claimant's proposed parameters and guidelines to accurately reflect the Commission's Statement of Decision.

The claimant also contends that the cost of transcribing the tape recordings of an interrogation is reasonably necessary to comply with the mandate. The claimant contends that "the tape is meaningless without a transcription."[10] Staff agrees and has included this component in Section IV. (C) (3) of the parameters and guidelines.

Thus, staff has modified Section IV. (C) as follows:

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[10] Exhibit __, Claimant's response to staff's request for further comments, page 5.

"3. Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

Included in the foregoing is the cost of tape and storage, and the cost of transcription.

4. Providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

a) The further proceeding is not a disciplinary action;

b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest is not affected (i.e., the charges supporting the dismissal does not harm the employee's reputation or ability to find future employment);

c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

Included in the foregoing is the cost of tape copying.

4.5. Producing transcribed copies of any notes made by a stenographer ~~or tape recording~~ at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, ~~whether or not the investigation results in any disciplinary action~~ in the following circumstances (Gov. Code, § 3303, subd. (g)):

a) When the investigation does not result in disciplinary action; and

b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

Included in the foregoing~~, but not limited thereto,~~ is the review of the complaints, notes or tape recordings for issues of confidentiality by law enforcement, human relations or counsel; ~~cost of tape copying, tape and storage~~; cost of ~~transcription,~~ processing, service and retention of copies."

Section IV. (D), Adverse Comment

Government Code sections 3305 and 3306 provide peace officers with procedural rights to receive notice, and review and respond to an adverse comment entered in the officer's personnel file.

The Commission found that Government Code sections 3305 and 3306 constitute a partial reimbursable state mandated program for those activities not previously required by the due process clause and/or statutory law. (See pages 26 through 28 of the Statement of Decision.)

The claimant's proposed parameters and guidelines contains the same activities listed in the Commission's Statement of Decision regarding adverse comments, and also includes the following paragraph:

> "Included in the foregoing, but not limited thereto, are review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; *officer's time in response to adverse comment*; review of response to adverse comment, attaching same to adverse comment and filing." (Emphasis added.)

As indicated in the above paragraph, the claimant is requesting reimbursement for the officer's time in response to the adverse comment. Staff disagrees with this request.

Government Code section 3306, which addresses the officer's response to an adverse comment, states the following:

> "A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment."

The Commission found that section 3306 requires the local agency to provide an opportunity to respond to the adverse comment within 30 days. (See page 19 of the Statement of Decision.) However, the Commission never found, and the statute does not require, that the officer file a response. Rather, the decision to file a response to the adverse comment is left up to the individual officer.

Therefore, staff finds that compensating local agencies for the officer's time in responding to an adverse comment is not mandated by the state and is, thus, not eligible for reimbursement. Accordingly, staff modified Section IV. (D) of the proposed parameters and guidelines by striking out the words "officer's time in response to adverse comment."

Section VI. Supporting Data

The State Controller's Office requests that language be included to validate the quantity of work performed for the costs claimed. The Controller's Office requests eligible claimants to identify the following:

"Number of cases in process at the beginning of the fiscal year ___
Number of new cases added during the fiscal year ___
Number of cases completed or closed during the fiscal year ___
Number of cases in process at the end of the fiscal year ___"

Staff has included this language in Section VI. Supporting Data.

Staff Recommendation

Staff recommends that the Commission adopt the Claimant's Proposed Parameters and Guidelines, as Modified by Staff, beginning on the following page.

CLAIMANT'S DRAFT PARAMETERS AND GUIDELINES

AS MODIFIED BY STAFF

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

I. SUMMARY AND SOURCE OF THE MANDATE

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights (POBAR), ~~Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174 and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675~~.

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts[11] when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees), and peace officers on probation who have not reached permanent status.

On ~~August 26, 1999,~~ November 30, 1999, the Commission adopted its Statement of Decision ~~found~~ that the test claim legislation constitutes a partial reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

II. ELIGIBLE CLAIMANTS

Counties, cities, a city and county, school districts and special districts ~~which~~ that employ peace officers are eligible claimants.

III. PERIOD OF REIMBURSEMENT

At the time this test claim was filed, Section 17557 of the Government Code stated that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. On December 21, 1995, the City of Sacramento filed the test claim for this mandate. Therefore, costs incurred for Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter

[11] Government Code section 3301 states: "For purposes of this chapter: the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675 are eligible for reimbursement on or after July 1, 1994.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to section 17561, subdivision (d)(1) of the Government Code, all claims for reimbursement of initial years' costs shall be submitted within 120 days of notification by the State Controller of the issuance of claiming instructions.

If total costs for a given year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

For each eligible claimant, all direct and indirect costs of labor ~~including overtime~~, supplies and services, training and travel ~~for law enforcement, human resources, legal counsel and other departments or contract services~~ for the performance of the following activities, are eligible for reimbursement:

A. Administrative Activities (On-going Activities)

1. Developing or updating internal policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities

2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate.

3. ~~Maintenance of the systems to conduct the mandated activities.~~ Updating the status of the POBAR cases.

~~4. Providing direct supervision over the agency staff performing the mandated activities.~~

B. ~~On-Going Activities~~ Administrative Appeal

1. Reimbursement period of July 1, 1994 through December 31, 1998 – The administrative appeal activities listed below apply to permanent employees, at-will employees, and probationary employees.

~~1.~~ Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions, ~~together with the defense of same in any court proceeding~~ (Gov. Code, § 3304, subd. (b)):

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Included in the foregoing, ~~but not limited thereto,~~ are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal

review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.

2. Reimbursement period beginning January 1, 1999 – The administrative appeal activities listed below apply to permanent employees and the Chief of Police

Providing the opportunity for, and the conduct of an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

- Dismissal, demotion, suspension, salary reduction or written reprimand received by the Chief of Police whose liberty interest is not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent employees for purposes of punishment;
- Denial of promotion for permanent employees for reasons other than merit; and
- Other actions against permanent employees or the Chief of Police that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Included in the foregoing are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.

C. Interrogations

Claimants are eligible for reimbursement for the performance of the activities listed in this section only when a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)

Claimants are not eligible for reimbursement for the activities listed in this section when an interrogation of a peace officer is in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer. Claimants are also not eligible for reimbursement when the investigation is concerned solely and directly with alleged criminal activities. (Gov. Code, § 3303, subd. (i).)

~~2.~~ 1. ~~Conducting an interrogation of a peace officer while the officer is on duty, or compensating~~ When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

Included in the foregoing~~, but not limited thereto,~~ is the ~~review of the necessity for the questioning and responses given; providing notice to all parties concerned of the time and place of the interview and scheduling thereof~~; preparation and review of overtime compensation requests~~; review of proceedings by counsel~~.

2. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)

Included in the foregoing~~, but not limited thereto,~~ is the review of agency complaints or other documents to prepare the notice of interrogation; ~~the nature of the interrogation; review by counsel;~~ determination of the investigating officers; redaction of the agency complaint for names of the complainant or other accused parties or witnesses or confidential information; ~~and~~ preparation ~~and presentation to officer~~ of notice or agency complaint; review by counsel; and presentation of notice or agency complaint to peace officer.

3. Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

Included in the foregoing is the cost of tape and storage, and the cost of transcription.

4. Providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

a) The further proceeding is not a disciplinary action;

b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest is not affected (i.e., the charges supporting the dismissal does not harm the employee's reputation or ability to find future employment);

c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

Included in the foregoing is the cost of tape copying.

~~4.~~5. Producing transcribed copies of any notes made by a stenographer ~~or tape recording~~ at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, ~~whether or not the investigation results in any disciplinary action~~ in the following circumstances (Gov. Code, § 3303, subd. (g)):

a) When the investigation does not result in disciplinary action; and

b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;

- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

Included in the foregoing~~, but not limited thereto,~~ is the review of the complaints, notes or tape recordings for issues of confidentiality by law enforcement, human relations or counsel; ~~cost of tape copying, tape and storage~~; cost of ~~transcription,~~ processing, service and retention of copies.

D. Adverse Comment

~~5.~~ Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties obtained are entitled to reimbursement for:

- Providing notice of the adverse comment: and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Included in the foregoing~~, but not limited thereto,~~ are review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; ~~officer's time in response to adverse comment~~; review of response to adverse comment, attaching same to adverse comment and filing.

V. CLAIM PREPARATION AND SUBMISSION

Claims for reimbursement must be timely filed and identify each cost element for which reimbursement is claimed under this mandate. Claimed costs must be identified to each reimbursable activity identified in Section IV of this document.

SUPPORTING DOCUMENTATION

Claimed costs shall be supported by the following cost element information:

A. Direct Costs

Direct Costs are defined as costs that can be traced to specific goods, services, units, programs, activities or functions.

Claimed costs shall be supported by the following cost element information:

1. Salaries and Benefits

   Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the reimbursable activities performed and specify the actual time devoted to each reimbursable activity by each employee, the productive hourly rate, and related employee benefits.

   Reimbursement includes compensation paid for salaries, wages, and employee benefits. Employee benefits include regular compensation paid to an employee during periods of authorized absences (e.g., annual leave, sick leave) and the employer's contributions to social security, pension plans, insurance, and worker's compensation insurance. Employee benefits are eligible for reimbursement when distributed equitably to all job activities performed by the employee.

2. Materials and Supplies

   ~~Identify the expenditures that are a direct cost of this mandate.~~ Only expenditures that can be identified as a direct cost of this mandate may be claimed. List the cost of the materials and supplies consumed specifically for the purposes of this mandate. Purchases shall be claimed at the actual price after deducting cash discounts, rebates and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged based on a recognized method of costing, consistently applied.

3. Contract Services

Provide the name(s) of the contractor(s) who performed the services, including any fixed contracts for services. Describe the reimbursable activity(ies) performed by each named contractor and give the number of actual hours spent on the activities, if applicable. Show the inclusive dates when services were performed and itemize all costs for those services. Submit contract consultant and attorney invoices with the claim.

4. Travel

Travel expenses for mileage, per diem, lodging, and other employee entitlements are eligible for reimbursement in accordance with the rules of the local jurisdiction. Provide the name(s) of the traveler(s), purpose of travel, inclusive dates and times of travel, destination points, and travel costs.

5. Training

The cost of training an employee to perform the mandated activities is eligible for reimbursement. Identify the employee(s) by name and job classification. Provide the title and subject of the training session, the date(s) attended, and the location. Reimbursable costs may include salaries and benefits, registration fees, transportation, lodging, ~~expenses~~ and per diem.

B. Indirect Costs

Indirect costs are defined as costs which are incurred for a common or joint purpose, benefiting more than one program and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of central government services distributed to other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the OMB A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) for the department if the indirect cost rate claimed exceeds 10%. If more than one department is claiming indirect costs for the mandated program, each department must have its own ICRP prepared in accordance with OMB A-87. An ICRP must be submitted with the claim when the indirect cost rate exceeds 10%.

VI. SUPPORTING DATA

For audit purposes, all costs claimed shall be traceable to source documents (e.g., employee time records, invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, etc.) that show evidence of the validity of such costs and their relationship to the state mandated program. All documentation in support of the claimed costs shall be made available to the State Controller's Office, as may be requested, and all reimbursement claims are subject to audit during the period specified in Government Code section 17558.5, subdivision (a).

<u>All claims shall identify the number of cases in process at the beginning of the fiscal year, the number of new cases added during the fiscal year, the number of cases completed or closed during the fiscal year, and the number of cases in process at the end of the fiscal year.</u>

VII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimant experiences as a direct result of the subject mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S OFFICE REQUIRED CERTIFICATION

An authorized representative of the claimant shall be required to provide a certification of the claim, as specified in the State Controller's claiming instructions, for those costs mandated by the State contained herein.

~~IX. DATA FOR DEVELOPMENT OF THE STATEWIDE COST ESTIMATE~~

~~The State Controller's Office is directed to include in the claiming instructions a request that Claimants send an additional copy of the test claim forms for the initial years' reimbursement claims by mail to the Commission on State Mandates, at 1300 I Street, Suite 950, Sacramento, CA 95814. Although providing this information to the Commission on State Mandates is not a condition of reimbursement, Claimants are encouraged to provide this information to enable the Commission to develop a statewide cost estimate that will be the basis for the appropriation to be made by the Legislature for this program.~~

List Date: 04/03/1996 Mailing Information Other

Mailing List

Claim Number	CSM-4499 Claimant City of Sacramento Test Claim
Subject	amending sections 3300-3310
Issue	465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90, Peace Officers Procedural Bill of Rights

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Claim Number	CSM-4499	**Claimant**	City of Sacramento Test Claim
	amending sections 3300-3310		
Subject	465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,		
Issue	Peace Officers Procedural Bill of Rights		

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Claim Number CSM-4499 **Claimant** City of Sacramento Test Claim

amending sections 3300-3310

Subject 465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,

Peace Officers Procedural Bill of Rights

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COMMISSION ON
STATE MANDATES

COMMENTS TO STAFF ANALYSIS
DRAFT PROPOSED PARAMETERS AND GUIDELINES
Peace Officers Procedural Bill of Rights
Government Code Sections 3300 through 3310
Comments to Draft Staff Analysis

This comment is in response to the Draft Staff Analysis on the above-referenced Draft Proposed Parameters and Guidelines. Specifically, this comment is to address Section IV (B) – Administrative Appeal, and your staff's proposal that legal defense costs are not reimbursable.

On page 5 of the Draft Staff Analysis, staff states:

> "Staff also finds that activities resulting from Government Code section 3309.5 cannot be included in the parameters and guidelines because the Commission has not made a test claim finding that section 3309.5 constitutes a reimbursable state mandate under article XIIIB, section 6 of the California Constitution. That section gives the superior court original jurisdiction over proceedings alleging that a local agency has violated a peace officer's POBAR rights. Section 3309.5 was specifically designed to allow a peace officer to pursue a remedy immediately in the courts *during* the investigation and not require that the officer wait until after the administrative appeal. [Footnote omitted.] Although section 3309.5 is part of POBAR, the claimants never alleged during the test claim hearing, or in response to the Commission's Statement of Decision, or during the hearing on the Statement of Decision that section 3309.5 imposes reimbursable state mandated activities. [Footnote omitted.]"

In essence, it is the Commission's staff's position that, without prior notice to claimant, unless an **activity** is specifically mentioned in the Statement of Decision, that activity cannot be reimbursable. It is respectfully submitted that this contention is in error. Rather, it is submitted that traditionally, the scope of the mandate is defined by the Statement of Decision, while reimbursable activities are defined by the Parameters and Guidelines.

First of all, it must be noted that the within test claim was filed with the Commission on December 21, 1995. (Table of Contents for Test Claim, Exhibits A through J, August 26, 1999 hearing date, page 349. Hereinafter this document shall be referred to as "TC".) Attached to the original test claim as filed are all of the statutes upon which the test claim was based. On TC 372, is contained Chapter 405, Statutes of 1979, which added Government Code section 3309.5 to POBAR. Reference to this

statute is had on the face sheet of the test claim (TC 349) as well as on the face age of the narrative of the test claim. (TC 350).

Secondly, the issue of litigation of POBAR rights has been a thread going through the entire test claim process. Your staff has analyzed at depth numerous cases involving POBAR, particularly in connection with the scope of the mandate, and to what extent POBAR exceeds the requirements of *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194. In fact, the first 312 pages of the TC is devoted to litigation concerning *Skelly* and POBAR.

The issue of litigation concerning POBAR rights was raised by Ms. Dee Contreras at the hearing on the test claim in this matter. Furthermore, the record on the test claim is replete with references concerning litigation over POBAR rights. (See Comments to Draft Staff Analysis received by the Commission on August 6, 1999, commencing at page 9.)

Thus, even prior to Claimant's submission of Draft Parameters and Guidelines, the issue of litigation over POBAR rights was clearly submitted and in issue.

If it is the position of the Commission's staff that unless a specific section is mentioned by staff in the Statement of Decision, which it prepares, that the required activity cannot be included in the parameters and guidelines, then it is a rule of general application. A rule of general application cannot be utilized unless it is adopted pursuant to the requirements of the State Administrative Procedures Act, Government Code, Section 11340, *et seq.*:

"No state agency shall issue, utilize, enforce, or attempt to enforce any guidelines, criterion, bulleting, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342 unless . . .[it] has been adopted as a regulation[1] and filed with the Secretary of State pursuant to this chapter."

With no statute or regulation authorizing the Commission to require each and every activity to be determined by the Statement of Decision to be delineated in order to be reimbursable pursuant to the Parameters and Guidelines is a rule of general application. Unless and until such time as it is adopted as a regulation, it is respectfully submitted that same cannot be enforced.

If a state agency fails to adopt a standard of general application as a regulation, the standard of general application is void, and without any legal effect. *See, Tidewater*

[1] Section 11342(g) defines regulation as follows: "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure, except one that relates only to the internal management of the state agency. . . ."

Marine Western, Inc. v. *Bradshaw* (1996) 14 Cal.4th 557, 572; *Armistead* v. *State Personnel Board* (1978) 3 Cal.3d 198, 201; *United Systems of Arkansas* v. *Stamison* (1998) 63 Cal.App.4th 1001, 1010; *Grier* v. *Kizer* (1990) 219 Cal.App.3d 442, 440 (audit method was void for failure to comply with the APA; overruled on other grounds.)

Accordingly, if the Commission wishes to utilize this narrow rule as a rule of general application, it must go through the procdedure to adopt same as a regulation.

If, on the other hand, this rule is only to be applied to this particular test claim, to do so would be arbitrary and capricious. An administrative action which is performed in an arbitrary and capricious manner is subject to reversal. *See, Shuffer* v. *Board of Trustees* (1977) 67 Cal.App.3d 208,l 220-221.

Rather, an interpretation of existing statutes and regulations in a manner which saves them from being declared void is the interpretation that the Statement of Decision provides the scope of the mandate. In the within instance, the Commission found that to the extent that POBAR exceeds the scope of *Skelly*, there is a mandated program. The nature of the activities which are reimbursable are determined by the development of the Parameters and Guidelines. This has been the traditional process in addressing mandate claims: the Statement of Decision determines the scope of the mandate, while the Parameters and Guidelines address reimbursable activities. This interpretation is also consistent with Government Code, section 17557, which requires that the Commission adopt Parameters and Guidelines that specify elements of reimbursable costs.

This interpretation does not put any party in jeopardy. In the within matter, the issue of reimbursement for the costs of legal defense has been at issue since the filing of the Draft Parameters and Guidelines on December 29, 1999. The issue was placed in contention by the filing of the Department of Finance with its response dated January 19, 2000. Additionally, it has been the subject of a prehearing conference, and was addressed by the Declaration of Dee Contreras. This issue does not put the Commission at risk, as the nature and scope of the necessity of attorneys fees for defense of a matter has been addressed by staff in the Draft Staff Analysis, particularly on page 5, and as quoted above.

With POBAR, employees are given significant new rights, which are not applicable to general civil service administrative hearings. In *Mounger* v. *Gates* (1987), an action addressing the interpretation of POBAR, the court held that an officer is not required to exhaust administrative remedies prior to bringing a judicial action under POBAR. Rather, Government Code, section 3309.5 (b) provides the Superior Court with initial jurisdiction to address purported violations of the act. Thus, an employee need not await the outcome of an administrative action before addressing whether POBAR has been violated.

POBAR rights, however, may be waived by the employee. *Zazueta* v. *County of San Benito* (1995) held that an employee had waived his rights to sue under POBAR,

when he agreed to binding arbitration under the Memorandum of Understanding between the deputy sheriff's association and the county.

Gales v. *Superior Court* (1996) 47 Cal.App.4th 1596 upheld the right of the employee to file a contemporaneous POBAR action together with a Code of Civil Procedure, Section 1094.5 writ of administrative mandamus concerning administrative action taken against him, by way of demotion. The court held that the POBAR action could be maintained notwithstanding the fact that the City of Pasadena had already issued its final administrative decision.

In *City of Los Angeles* v. *Superior Court* (1997) 57 Cal.App.4th 1506, the court held that POBAR applies to "innocent preliminary or casual conversation or remarks between a supervisor and officer. . . . The subdivision excludes routine communication within the normal course of administering the department. . . ." Supra, at 1514. Based on the foregoing, the court found that the questioning of Officer Labio was subject to POBAR, as the investigation went to his conduct concerning an accident. As Officer Labio had not been informed of his POBAR rights, the appellate court sustained the trial court's suppression of Officer Labio's statements while being interrogated. However, the appellate court did admit same for purposes of impeachment. Supra at 1517-1518.

Accordingly, on behalf of claimant, we respectfully request that the Commission's staff review its conclusion that all elements of reimbursable cost need to be detailed in the Statement of Decision before same can be included in the Parameters and Guidelines. We further respectfully request that the Parameters and Guidelines include legal defense costs occasioned by the adoption of Government Code, section 3309.5.

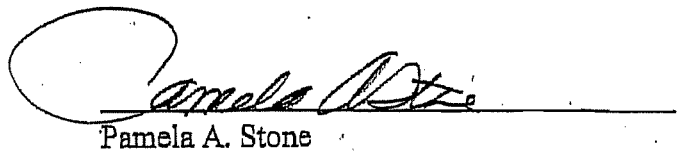
DECLARATION OF PAMELA A. STONE

I, Pamela A. Stone, make the following declaration under oath:

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 5th day of July, 20000, at Sacramento, California.



Pamela A. Stone

DECLARATION OF SERVICE

State of California
County of Sacramento

I am at all times herein mentioned, over the age of eighteen years, and not a party to nor interested in the within matter. I am employed by DMG-MAXIMUS, INC. My business address is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841, County of Sacramento, State of California.

That on the 5th day of July, 2000, I served the COMMENTS TO STAFF ANALYSIS DRAFT PROPOSED PARAMETERS AND GUIDELINES *Peace Officers Procedural Bill of Rights* Government Code Sections 3300 through 3310 Comments to Draft Staff Analysis on the interested parties by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at Sacramento, California, addressed as set forth in the Attachment 1, attached hereto and incorporated herein by reference.

That I am readily familiar with the business practice of DMG-MAXIMUS, INC. for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United State mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 5th day of July, 2000 at Sacramento, California.

Declarant

ATTACHMENT 1

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20 Cal.4th 805
977 P.2d 693, 85 Cal.Rptr.2d 696, 99 Cal. Daily Op. Serv. 4822, 1999 Daily Journal D.A.R. 6215
(Cite as: 20 Cal.4th 805)

EXHIBIT J

TIMOTHY FUKUDA, Plaintiff and Appellant,
v.
CITY OF ANGELS, Defendant and Appellant.

No. S071467.

Supreme Court of California

June 21, 1999.

SUMMARY

In administrative mandamus proceedings (Code Civ. Proc., 1094.5) filed by a discharged police officer against a city, the trial court found that the evidence did not support the findings on which plaintiff's dismissal was based and entered a judgment barring plaintiff's termination. (Superior Court of Calaveras County, No. 19480, Richard E. Tuttle, Judge. [FN*]) The Court of Appeal, Third Dist., No. C018274, affirmed.

FN* Retired judge of the Sacramento Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal with directions to remand the matter to the trial court for further proceedings. The court held that the trial court erred in ruling that when exercising independent judgment in administrative mandamus proceedings, a trial court may not afford the agency's findings any presumption of correctness and must place the burden of proof on the entity supporting the administrative agency's decision. Rather, in exercising its independent judgment, a trial court must afford a strong presumption of correctness to the administrative findings, and the party challenging the administrative decision bears the burden of convincing the trial court that the administrative findings are contrary to the weight of the evidence. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings. The court also held that the burden imposed on the party challenging the administrative decision is a burden of proof (Evid. Code, 115) and not merely a burden of producing evidence (Evid. Code, 110). Finally, the court held that in view of the long-standing duration of the judicial precedent establishing and reaffirming independent judgment review, and the legislative history of Code Civ. Proc., 1094.5, which implicitly recognizes the rule, it would be inappropriate to judicially abrogate the independent judgment rule at this point, and that the policy arguments advanced in support of such a change properly should be directed to the Legislature. (Opinion by George, C. J., expressing the unanimous view of the court.) *806

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 99--Judicial Review and Relief--Administrative Mandamus--Construction of Statute.
Code Civ. Proc., 1094.5, is a codification of the procedure the Supreme Court devised for reviewing the adjudications of administrative agencies, and the scope of review under the statute is the same as that specified in the Supreme Court's opinions. The Judicial Council's 1944 biennial report is valuable in ascertaining the meaning of the statute. The council drafted the statute at the Legislature's request and in this respect was a special legislative committee. As part of its report containing the proposed legislation, the Judicial Council told the Legislature what it intended by the language used. In the absence of compelling language in the statute to the contrary, it is assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report.

(2) Administrative Law § 111--Judicial Review and Relief--Administrative Mandamus--Scope and Extent of Review--Independent Judgment--Presumption as to Administrative Findings.
In administrative mandamus proceedings (Code Civ. Proc., 1094.5) filed by a discharged police officer against a city, the trial court erred in ruling that when exercising independent judgment a trial court may not afford the agency's findings any presumption of correctness and must place the burden of proof on the entity supporting the administrative agency's decision. On the contrary, in exercising its independent judgment, a trial court must afford a strong presumption of correctness to the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. The presumption provides the trial court with a starting point for review-but it is only a presumption, and it may be overcome. Because the trial court ultimately must exercise its own independent

judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, 112.]

(3) Administrative Law § 108--Judicial Review and Relief--Administrative Mandamus--Burden of Proof.
In administrative mandamus proceedings (Code Civ. Proc., 1094.5), in which the trial court exercises its independent judgment, the party challenging the administrative *807 decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. That rule imposes a burden of proof (Evid. Code, 115) and not merely a burden of producing evidence (Evid. Code, 110). The legislative history of Code Civ. Proc., 1094.5, demonstrates that the Legislature intended that statute to embrace the traditional allocation of the burden of proof contained in Evid. Code, 500.

(4) Administrative Law § 131--Judicial Review and Relief--Substantial Evidence Rule.
Even when the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test.

(5) Administrative Law § 138--Decision of Courts on Review and Subsequent Proceedings.
On appeal from an administrative mandamus proceeding (Code Civ. Proc., 1094.5) brought by a discharged police officer, in which the trial court erroneously ruled that when exercising independent judgment a trial court may not afford the agency's findings any presumption of correctness and must place the burden of proof on the entity supporting the administrative agency's decision, the reviewing court could not properly review the trial court's findings and decision for substantial evidence, because the trial court's findings were themselves infected by its fundamental error. Accordingly, a remand to the trial court for further proceedings was the appropriate disposition.

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For California Supreme Court Briefs See: 1998 WL 635843 (Pet.Brief)

GEORGE, C. J.

We granted review to address two important questions of administrative law arising in instances in which a trial court is required to exercise " independent judgment" review of an agency determination. First, in exercising such review, must a trial court afford a "strong presumption" that the administrative findings are correct? Second, does the petitioner seeking a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5 bear the burden of proving that these findings are incorrect?

The Court of Appeal answered both questions in the negative, reasoning that presuming the correctness of administrative findings and placing the burden of proof on the petitioner would be incompatible with independent judgment review. We conclude that the Court of Appeal was in error, and that the judgment of the Court of Appeal must be reversed. As we shall explain, long-established case law demonstrates that neither presuming the correctness of administrative findings, nor placing the burden on the petitioner, is inconsistent with independent judgment review as that

term has been understood in this state.

After we accepted review in this matter, we granted the requests of a number of amici curiae to file briefs addressing, among other things, whether this court should continue to apply-or should abrogate-the independent judgment rule. As explained below, in view of the long-standing duration of the judicial precedent establishing and reaffirming independent judgment review, and the legislative history of Code of Civil Procedure section 1094.5, which implicitly recognizes the rule, we conclude that it would be inappropriate to judicially abrogate the independent judgment rule at this point, and that the policy arguments advanced in support of such a change properly should be directed to the Legislature. *809

I

This matter commenced as a disciplinary proceeding against Timothy Fukuda, a veteran police officer of the City of Angels (City), [FN1] based upon his conduct during and following the chase and apprehension of a reckless and erratic driver of a vehicle around midnight sometime in mid-August 1992.

FN1 The City of Angels is comprised of Angels Camp and Altaville.

The police department's internal affairs unit investigated Fukuda's conduct, and in mid-November 1992, after Fukuda had waived a "pre-disciplinary meeting," Police Chief John Bart advised Fukuda in writing that he was dismissed from the police department. Chief Bart asserted that Fukuda's conduct during the chase-which included driving in the opposite direction of traffic, engaging in a "rolling roadblock" [FN2] in violation of department policy, and very nearly being rammed by the suspect's automobile-had been unreasonably dangerous, and that Fukuda, in his written report and in his interviews with the department's internal affairs unit, had lied about his conduct.

FN2 A rolling roadblock occurs when an officer slows his or her vehicle to a near stop in an effort to block the forward progress of a following vehicle.

Pursuant to the City's "Memorandum of Understanding" with the police officers' association, Fukuda exercised his right to "appeal" the termination. The city council designated a hearing officer who was "not ... from the office of the City Attorney," who had been "licensed [and] ... admitted to practice in this State for at least 10 years," and who was a "member of the American Arbitration Association." (Mem. of Understanding, art. XIV, 14.03.) There followed a seven-day transcribed hearing held in accordance with Government Code sections 11507.6 and 11513 (setting out rules for discovery and evidence), at which Fukuda and numerous other witnesses testified and at which voluminous evidence was received. The hearing officer rendered a written recommendation concerning the "appropriate disposition of the case." (See Mem. of Understanding, art. XIV, 14.04.) The recommendation (i) adopted the nine written findings of Chief Bart, (ii) rejected as unsupported by the evidence Fukuda's assertion that the termination decision was motivated by retaliation against him for having engaged in union activities, and (iii) sustained the termination recommendation.

Two of the findings addressed Fukuda's conduct during the pursuit: first, that he engaged in a pursuit outside the City, in conjunction with allied agencies, without being requested or authorized to do so; and second, that Fukuda engaged in a rolling roadblock in violation of department policy. The remaining findings addressed Fukuda's conduct after the pursuit: that he *810 misrepresented the facts in his report on the incident and lied to investigators after the incident.

Thereafter, in accordance with the Memorandum of Understanding, the hearing officer's findings were forwarded to the city council. After consideration, the city council followed the recommendation of the hearing officer and dismissed Fukuda.

Fukuda sought a writ of administrative mandamus to challenge the action of the city council. (Code Civ. Proc., 1094.5; hereafter section 1094.5.) The trial court, observing that Fukuda's "right to continued employment is a fundamental right," stated that the City "must therefore establish that the weight of the evidence supports the findings. This means that [the City] has the burden of proof to produce a preponderance of evidence in support of the findings." [FN3] Discounting the evidence upon which the hearing officer and the city council had relied, the trial court concluded that in most respects the City had "failed to establish" the various findings against Fukuda. The court found that Fukuda had engaged in a prohibited roadblock, but also concluded that the city council abused its discretion by imposing the penalty of termination. At the same time, the trial court also rejected Fukuda's assertion that the proceedings were instituted against him in retaliation for his union

activities. As noted, the Court of Appeal affirmed, rejecting the City's assertion that the superior court erred by placing the burden of proof on the City.

> FN3 The trial court also stated: "[Fukuda], however, has the burden of proof with respect to the assertion that he was wrongfully discharged because of his union activity since this is in the nature of an affirmative defense."

II

Section 1094.5 sets out the procedure for obtaining judicial review of a final administrative determination by writ of mandate. Two subdivisions of section 1094.5 are relevant here. Subdivision (b) provides that "[t]he inquiry in such a case shall extend to the questions whether the [agency] proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Subdivision (c) of section 1094.5 provides in full: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the *811 evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Section 1094.5 does not, on its face, specify which cases are subject to independent judgment review. Nor does it expressly allocate the burden of proof or articulate any presumption concerning the correctness of administrative findings in cases in which a trial court exercises independent judgment review. As explained below, however, each of those issues was squarely resolved by case law that preceded the enactment of section 1094.5 in 1945, and each has been reaffirmed repeatedly by subsequent case law that has governed the application of section 1094.5 for the past half century.

A

In the mid-1930's this court held that the determinations of state administrative agencies are not judicially reviewable by writ of certiorari or prohibition (Standard Oil Co. v. State Board of Equal. (1936) 6 Cal.2d 557 [59 P.2d 119]; Whitten v. California State Board, Etc. (1937) 8 Cal.2d 444 [65 P.2d 1296, 115 A.L.R. 1]), but instead are reviewable by writ of mandamus (often denominated writ of mandate; see Code Civ. Proc., 1084). (Drummey v. State Bd. of Funeral Directors (1939) 13 Cal.2d 75 [87 P.2d 848] (Drummey).) The issues presented by this case have their origin in the Drummey decision.

In Drummey, supra, 13 Cal.2d 75, a statewide administrative board, after a hearing, suspended the petitioner's embalming license for one year. Upon the petitioner's request, the trial court issued first an alternative writ and then a peremptory writ of mandate commanding the board to dismiss the proceedings and restore the petitioner's license. On review of the appeal filed by the administrative board, we affirmed. We first explained that review by writ of mandate is the appropriate mode of review in such matters. (Id. at p. 84.) We then addressed "the question as to what weight the courts should give to the findings of the board-or, stated another way, are the findings of the board, if based on substantial although conflicting evidence, binding on the courts in the mandamus proceeding, as they would be in a certiorari proceeding or on an appeal?" (Ibid., italics in original.)

We concluded that when a court reviews an administrative determination such as the one at issue, suspending a professional license, the court must "exercise its independent judgment on the facts, as well as on the law ...." (Drummey, supra, 13 Cal.2d at p. 84.) We also defined the extent of *812 " independent judgment" review, explaining that such review "does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort.... [I]n weighing the evidence the courts can and should be assisted by the findings of the board. The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence. " (Id. at p. 85, italics added.)

Our opinion in Drummey immediately thereafter characterized the above quoted allocation of the burden of proof and presumption of correctness as " sound" "limitations on the rule that the court must exercise its independent judgment." (Drummey, supra, 13 Cal.2d at p. 86.) We reiterated and explained: "The findings of a board where formal hearings are held should and do

come before the courts with a strong presumption in their favor based primarily on the [rebuttable] presumption contained in section 1963, subsection 15, of the Code of Civil Procedure [currently Evidence Code section 664] 'That official duty has been regularly performed.' Obviously, considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." (Ibid.)

Applying these principles to the matter then before us in Drummey, we reviewed the superior court's judgment "ordering the issuance of a peremptory writ commanding the board to reinstate" the petitioner's license. (Drummey, supra, 13 Cal.2d at p. 86.) We observed that findings by the trial court had been waived, and that "[i]t must be conclusively presumed on this appeal that the trial court weighed the evidence giving due weight to the presumption in favor of the board's findings, but nevertheless, exercising its independent judgment, found against the board." (Ibid., italics added.) We concluded that the trial court's judgment "must be affirmed" because it was, in turn, supported by substantial evidence in the record. (Ibid.) We restated this analysis at the close of the opinion: "Under such circumstances, the trial court having power to weigh the evidence, we must conclusively presume that the trial court performed its duty, gave full weight to the presumption of validity of the board's findings, but nevertheless found against the board on this count. The determination of the trial court on conflicting evidence on the facts is binding on this court on this appeal." (Drummey, supra, 13 Cal.2d at p. 88, italics added.)

Three years after Drummey, we decided Laisne v. Cal. St. Bd. of Optometry (1942) 19 Cal.2d 831 [123 P.2d 457] (Laisne), in which we stated that on mandamus review in the trial court, a petitioner challenging a statewide *813 administrative board's revocation of his certificate of registration to practice optometry was entitled to independent judgment review, which we characterized as a "trial de novo." (Id. at p. 845.) [FN4] A few months thereafter we clarified that the "substantial evidence" standard of review, and not independent judgment review, was the proper standard for judicial review of the determination of local, as contrasted with statewide, agencies. (Walker v. City of San Gabriel (1942) 20 Cal.2d 879 [129 P.2d 349, 142 A.L.R. 1383] (Walker).) [FN5]

FN4 A vigorous dissent by Chief Justice Gibson, joined by Justices Edmonds and Traynor, asserted that this standard of review was unwarranted and unwise, and that review should be by certiorari, not mandate. (19 Cal.2d at pp. 848-869.)

FN5 A few years thereafter, we further clarified that the "substantial evidence" standard of review, and not independent judgment review, was the proper standard for judicial review of the determination of agencies authorized by the California Constitution to exercise "powers of a judicial nature." (Covert v. State Board of Equalization (1946) 29 Cal.2d 125, 131-132 [173 P.2d 545].)
As noted below, more than three decades after Walker, we overruled Walker and other decisions and extended the applicability of independent judgment review to the final determinations of local agencies as well as statewide agencies. (Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29] (Strumsky).)

At the General Election in 1942, a proposed constitutional amendment (Proposition 16), drafted and supported by individuals critical of this court's decisions in Drummey and Laisne, was placed before the voters. That proposition would have authorized the Legislature or any chartered city (or city and county) to enact legislation providing that the determinations of administrative agencies would be subject to judicial review under only the " substantial evidence" standard of review instead of the broader "independent judgment" review provided for in this court's recently decided precedents. (See Ballot Pamp., Proposed Amend. to Cal. Const., with arguments to voters, Gen. Elec. (Nov. 3, 1942) p. 23 [Appen.]; see also id. at p. 20 et seq.) The proposition was overwhelmingly rejected by the electorate.

Thereafter, in Dare v. Bd. of Medical Examiners (1943) 21 Cal.2d 790 [136 P.2d 304] (Dare), we again turned our attention to the independent judgment standard of review, affirming a statewide board's revocation of the petitioner's license, and, in the process, clarifying aspects of both Drummey, supra, 13 Cal.2d 75, and Laisne, supra, 19 Cal.2d 831. First, we quoted our statement in Drummey that " 'the findings of the board come before the court with a strong presumption of their correctness' " (Dare, supra, 21 Cal.2d at p. 798), and explained: "If there is no requirement for formal findings and none are made, findings in favor of the prevailing party are implied from the determination of the board." (Id. at pp.

798-799.) Second, regarding Laisne's reference to "trial de novo" in the trial court (id. at pp. 793-794), we clarified *814 that a petitioner seeking a writ of mandate to overturn an administrative determination generally is bound by the record made at the administrative hearing, and may present additional evidence to the trial court only if such evidence could not "in the exercise of reasonable diligence, ... have been introduced before the board. " (Id. at p. 799.) [FN6]

FN6 Dare, supra, 21 Cal.2d 790, like Laisne, supra, 19 Cal.2d 831, was a four-to-three decision. Again, three dissenters, this time led by Justice Traynor, asserted that review should be by certiorari (and the substantial evidence standard of review), rather than mandate (and the independent judgment standard of review). (21 Cal.2d at p. 803 et seq.)

A few months after Dare, we decided Sipper v. Urban (1943) 22 Cal.2d 138 [137 P.2d 425] (Sipper). In that matter the petitioner unsuccessfully sought a writ of mandate in the trial court to compel an administrative agency to vacate an order suspending his real estate license. The trial court, exercising independent judgment, denied the writ. We affirmed, commenting that "[i]n his application for a writ it was incumbent upon [the petitioner] to state a prima facie case entitling him to relief." (Id. at p. 141.) In a concurring opinion, Justice Schauer described the state of the law as follows: "The procedure as now declared gives the reviewing court the power and duty of exercising an independent judgment as to both facts and law, but contemplates that the record of the administrative board shall come before the court endowed with a strong presumption in favor of its regularity and propriety in every respect and that the burden shall rest upon the petitioner to support his challenge affirmatively, competently, and convincingly. In other words, rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts." (Id. at p. 144 (conc. opn. of Schauer, J.).) [FN7]

FN7 Justice Schauer, who had only recently joined the court, also addressed the views of the three dissenting justices who would have recognized a right to judicial review of final administrative determinations by certiorari (and the substantial evidence standard of review), rather than mandate (and the independent judgment standard of review). Justice Schauer explained that although he agreed that certiorari rather than mandate appeared to be the most appropriate mode of review " from the academic standpoint" (22 Cal.2d at p. 146 (conc. opn. of Schauer, J.), he would adhere to the majority view in part out of respect for stare decisis.
Further, addressing the electorate's rejection of Proposition 16 in 1942- which, as noted ante, at page 813, would have permitted the Legislature or any chartered city (or city and county) to subject the determinations of administrative agencies to only substantial evidence review instead of the broader independent judgment review afforded by this court's precedents- Justice Schauer observed that "[b]y this overwhelming vote the people expressed their preference for the liberal policy followed by the court as opposed to the narrower one proposed to them. The State of California must therefore be recognized as committed to the broader policy encompassed by the mandamus procedure." (Sipper, supra, 22 Cal.2d 138, 153 (conc. opn. of Schauer, J.).)

B

Shortly thereafter, echoing suggestions in Justice Schauer's concurring opinion in Sipper, supra, 22 Cal.2d at page 146 et seq., the Legislature *815 enacted and the Governor signed legislation directing the Judicial Council to "make a thorough study of the subject ... of review of decisions of administrative boards, commissions and officers[,] ... formulate a comprehensive and detailed plan," and report its recommendations to the Legislature along with "drafts of such legislative measures as may be calculated to carry out and effectuate the plan." (Stats. 1943, ch. 991, 2, p. 2904.) The Judicial Council of California did so in its Tenth Biennial Report (1944) (Report). (See generally, Kleps, California's Approach to the Improvement of Administrative Procedure (1944) 32 Cal.L.Rev. 416.) The Report recommended, and the Legislature adopted with only minor changes, three major pieces of legislation: a statewide Department of Administrative Procedure (Rep., supra, at p. 10 et seq.; id., appen. A, p. 31 et seq.; see Gov. Code 11370.2 et seq.); the Administrative Procedure Act (Rep., supra, at p. 12 et seq.; id., appen. A, p. 33 et seq.; see Gov. Code, 11370); and the statute that we consider in the case now before us, section 1094.5 (Rep., supra, at p. 26 et seq.; id., appen. A, p. 45 et seq.).

Regarding section 1094.5, the Judicial Council's 1944 Report noted that the proposed legislation did "not depart from the procedural pattern laid down by recent

court decisions" (Rep., supra, at p. 26), but instead made provision " for the cases in which the court has the power to exercise an independent judgment on the evidence and also for cases in which the court merely examines the record to ascertain whether the decision is supported by substantial evidence." (Id. at p. 27.) Regarding the limitations recognized by Drummey and its progeny, upon the trial court's exercise of independent judgment, the Report stated: "[I]n [exercising an independent judgment on the facts and making their own findings], the courts must give effect to a presumption in favor of the agency's action ...." (Rep., supra, appen. B, pt. 3, at p. 141.) The Report asserted that "the exact effect of this presumption is impossible to estimate" (ibid.), but observed that the presumption arose from Drummey, Dare, and Sipper, and that it is based "upon the provisions of Code Civ. Proc., Sec. 1963[, subdivision] (15) [currently set out at Evidence Code section 664, presuming] that official duties have been regularly performed." (Rep., supra, appen. B, pt. 3, at p. 141, fn. 57.) The Report concluded on this point that the presumption in favor of agency findings "has the effect of an admonition to the court and of casting the burden of proof upon the person seeking to overthrow the administrative action." (Ibid., italics added.)

As indicated, the Legislature adopted and the Governor signed into law section 1094.5 as proposed by the Judicial Council in its 1944 Report. (Stats. 1945, ch. 868, 1, p. 1636.) Although the statute has been amended on many occasions since then, subdivisions (b) and (c), as relevant here, have remained substantively unchanged. *816

C

(1) From this history it is apparent that section 1094.5 "is a codification of the procedure devised for reviewing the adjudications of ... administrative agencies" in the series of cases outlined above in part II.A, and that "the scope of review under the ... statute is the same as that specified in those cases." (Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 105 [280 P.2d 1].) As observed in Hohreiter v. Garrison (1947) 81 Cal.App.2d 384 [184 P.2d 323], the Judicial Council's 1944 Report "is a most valuable aid in ascertaining the meaning of the statute.... [T]he council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation [the Judicial Council] told the Legislature what it intended to provide by the language used. In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (81 Cal.App.2d at p. 397, italics added; accord, Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802, 817 [140 Cal.Rptr. 442, 567 P.2d 1162] (Anton).)

Consistent with these observations, in the decades following the adoption of section 1094.5, a number of cases have quoted and acknowledged the limitations (recognized in the Judicial Council's Report) placed by Drummey and its progeny upon independent judgment review. In Bixby v. Pierno (1971) 4 Cal.3d 130 [93 Cal.Rptr. 234, 481 P.2d 242] (Bixby), the leading modern case discussing and explaining the independent judgment test, [FN8] we quoted with approval Drummey's statement that in applying " 'independent *817 judgment,' " a trial court must accord a " 'strong presumption of ... correctness' " to administrative findings, and that the "burden rests" upon the complaining party to show that the administrative " 'decision is contrary to the weight of the evidence.' " (Id. at p. 139; see also Campbell v. Board of Dental Examiners (1971) 17 Cal.App.3d 872, 875-876 [95 Cal.Rptr. 351] [a strong presumption supports the correctness of the findings of an administrative agency, and the burden of proof rests upon the petitioner to establish administrative error]; Chamberlain v. Ventura County Civil Service Com. (1977) 69 Cal.App.3d 362, 368 [138 Cal.Rptr. 155] [quoting Drummey' s "strong presumption of ... correctness" and burden of proof qualifications on independent judgment review]; San Dieguito Union High School Dist. v. Commission on Professional Competence (1982) 135 Cal.App.3d 278, 288 [185 Cal.Rptr. 203] [commission's "factual finding is entitled to substantial weight even in an 'independent judgment' hearing before the superior court"].) [FN9]

FN8 Bixby reaffirmed and clarified our case law, holding that when a trial court reviews a final administrative decision that substantially affects a fundamental vested right, the court "not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence ...." (Bixby, supra, 4 Cal.3d at p. 143.) By contrast, we explained, the case law stands for the proposition that " [i]f the administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law, but the trial

court need not look beyond that whole record of the administrative proceedings." (Id. at p. 144, fn. omitted.)

In response to arguments of a dissenting justice that the independent judgment test should be abandoned in favor of the substantial evidence test, the majority asserted that "[i]n view of [the] judicial history [of section 1094.5], the court would now assert a doubtful prerogative if it were to rule that no cases at all require an independent judgment review and that the Legislature created an empty category in section 1094.5. " (4 Cal.3d at p. 140.) The court in Bixby concluded that application of the independent judgment standard does not impose on trial courts a burden that is "significantly more" than that imposed by substantial evidence review (id. at p. 143, fn. 10), and that independent judgment review is necessary to protect individual liberty: "At a time in this technocratic society when the individual faces ever greater danger from the dominance of government and other institutions wielding governmental power, we hesitate to strip him of a recognized protection against the overreaching of the state. The loss of judicial review of a ruling of an administrative agency that abrogates a fundamental vested right would mark a sorry retreat from bulwarks laboriously built. Such an elimination would not only overrule decisions long held in California, but destroy a bed-rock procedural protection against the exertion of arbitrary power." (Id. at p. 151.)

FN9 Three years after Bixby, supra, 4 Cal.3d 130, our decision in Strumsky, supra, 11 Cal.3d 28, extended the independent judgment standard of review to the final determinations of local administrative boards, thereby overturning a number of cases (including Walker, supra, 20 Cal.2d 879) holding that the decisions of such boards are subject only to substantial evidence review. Thereafter, in Anton, supra, 19 Cal.3d 802, this court in turn extended Strumsky to the determinations of nongovernmental agencies subject to review under section 1094.5.

III

Despite this history, the Court of Appeal below concluded that Drummey and its progeny should not control, and that when exercising independent judgment a trial court may not afford the agency's findings any presumption of correctness, and must place the burden of proof on the entity supporting the administrative agency's decision.

(2) We reject the Court of Appeal's conclusion, under which agency determinations and findings would be entitled to no weight at all, and affirm the rule first articulated in Drummey, reaffirmed in Dare and Sipper, implicitly codified by the Legislature in section 1094.5, and thereafter reaffirmed by numerous opinions including Bixby: In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. *818

As explained below, opposing arguments advanced by Fukuda and accepted by the Court of Appeal are unpersuasive.

The Court of Appeal held, and Fukuda here asserts, that it would be confusing and inconsistent for a superior court to presume the correctness of administrative findings, and still exercise independent judgment review. Some justices and scholars who champion the more deferential substantial evidence standard of review have unsuccessfully advanced the same assertion in the course of arguing against the retention of independent judgment review. [FN10] But the assertion of incompatibility is no more persuasive when it comes, as in this case, from the advocates of independent judgment review. As explained by the Judicial Council's 1944 Report, the presumption "has the effect of an admonition to the court." (Rep., supra, appen. B, pt. 3, at p. 141, fn. 57.) In other words, the presumption provides the trial court with a starting point for review-but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings. This approach to the trial court's exercise of independent judgment long has been understood, and was, in fact, illustrated by Drummey itself, in which we twice observed that the trial court "weighed the evidence giving due weight to the presumption in favor *819 of the board's findings, but nevertheless, exercising its independent judgment, found against the board. " (13 Cal.2d at p. 86; see also id. at p. 88.) As shown by Drummey and its progeny, there is no inconsistency in a rule requiring that a trial court begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings. (Accord, Yamaha Corp. of America v. State Bd. of

Equalization (1998) 19 Cal.4th 1 [78 Cal.Rptr.2d 1, 960 P.2d 1031] [when interpreting a statute, a court must afford deference to the agency's interpretation, but ultimately exercise its own independent judgment]; cf. People v. Lang (1989) 49 Cal.3d 991, 1045 [264 Cal.Rptr. 386, 782 P.2d 627].)

FN10 Justice Burke's concurring opinion in Bixby, supra, 4 Cal.3d 130, 151, echoing earlier scholarly criticism of the independent judgment test (e.g., Kleps, Certiorarified Mandamus Review: The Courts and California Administrative Decisions-1949-1959 (1960) 12 Stan.L.Rev. 554; Netterville, Judicial Review: The "Independent Judgment" Anomaly (1956) 44 Cal.L.Rev. 262; McGovney, Administrative Decisions and Court Review Thereof in California (1941) 29 Cal.L.Rev. 110), asserted that independent judgment review provided insufficient deference to and respect for administrative determinations, and argued for abandonment in favor of substantial evidence review. In the process, Justice Burke, like the cited scholarly criticism, observed that the "presumption of correctness" and burden of proof articulated in Drummey, supra, 13 Cal.2d 75, and Dare, supra, 21 Cal.2d 790, "diminish the independence of the trial courts' review"-a result that Justice Burke and the commentators obviously approved as affording respect for the "expertise and discretion which, presumably, underlies any such [administrative] decision." (Bixby, supra, 4 Cal.3d at p. 154 (conc. opn. of Burke, J.).) As part of his general argument against independent judgment review, however, Justice Burke went on to assert-without analysis-that "commentators assume that the so-called 'presumption' will be ignored by the trial courts, since it is totally inconsistent with the concept of an independent judgment review. See, e.g., Kleps, supra, ... at page 577; Netterville, supra, ... at pages 279-280; McGovney, supra, ... at pages 129-130." (Bixby, supra, 4 Cal.3d at p. 154, fn. 12; accord, Anton, supra, 19 Cal.3d 802, 831, fn. 1 (dis. opn. of Clark, J.) ["Such a presumption, while perhaps desirable, appears inconsistent with the concept of independent judgment. "]; Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies (1995) 42 UCLA L.Rev. 1157, 1168; fn. 35 ["[I]t is difficult to reconcile [the] presumption with the independent judgment test. In practice, it appears that the ... presumption is ignored."].) As explained in the text above, we do not find either the presumption or the allocation of burden of proof to be incompatible with the exercise of independent judgment.

The Legislature's enactment of section 1094.5-in light of the Judicial Council's 1944 Report, and Drummey and its progeny-indicates legislative acceptance of the limitations placed by Drummey and later cases upon independent judgment review. The Legislature's subsequent failure to amend section 1094.5, subdivision (c), to remove those limitations further suggests legislative acceptance of the limitations. (See Viking Pools, Inc. v. Maloney (1989) 48 Cal.3d 602, 608-609 [257 Cal.Rptr. 320, 770 P.2d 732].) Indeed, in the course of making numerous amendments to the Administrative Procedure Act (see Stats. 1995, ch. 938), the Legislature recently has embraced similar limitations. Government Code section 11425.50, subdivision (b), directs trial courts to give "great weight" to credibility determinations of state agency hearing officers, even when the trial court conducts independent judgment review under section 1094.5. [FN11] Obviously, the Legislature sees no inconsistency in having the trial court first afford "great weight" to credibility determinations, and then exercise independent judgment in making its own findings.

FN11 This subdivision provides in relevant part: "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." (Gov. Code, 11425.50, subd. (b).)

(3) The Court of Appeal also held, and Fukuda here contends, that Drummey, supra, 13 Cal.2d 75, does not impose a burden of proof (defined in Evid. Code, 115) on the party contesting an administrative action, but instead imposes, at most, a burden of production (defined in Evid. Code, 110) on that party. We find no support for this view.

Evidence Code section 500 states that "[e]xcept as ... provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. " *820 This provision applies to writ

proceedings under section 1094. (Evid. Code, 300 ["Except as otherwise provided by statute, [the] code applies in every action before the ... superior court ...."].) Contrary to the Court of Appeal's unsupported statement that "section 1094.5 provides otherwise," that statute does so neither expressly nor implicitly. Indeed, as noted above, the history of the Judicial Council's 1944 Report demonstrates that the Legislature intended that section 1094.5 embrace Evidence Code section 500's traditional allocation of the burden of proof. [FN12]

> FN12 In support of its contrary view, the Court of Appeal relied upon Webster v. Trustees of Cal. State University (1993) 19 Cal.App.4th 1456, 1466 [24 Cal.Rptr.2d 150], in which the Court of Appeal remanded the matter to the trial court with directions to exercise independent judgment and to place the burden of proof upon the party supporting the administrative determination. As Fukuda concedes, Webster is inapposite and distinguishable. The Court of Appeal's remand directions in Webster constituted a case-specific remedy to correct a burden-allocation error made at the administrative level, and the case does not purport to stand for the proposition that, as a general matter, the burden of proof rests with the party seeking to support the administrative determination.

But, even without reference to Evidence Code section 500, both the allocation of burden of proof and the nature of that burden articulated in Drummey are clear on the face of our opinion in that case. Contrary to Fukuda's suggestion that the burden of proof did not rest with him, and that " the 'burden of proof' discussed in Drummey appears to go [only] to the burden on the petitioner to produce evidence in support of his claims," the language of the court in Drummey-"the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence" (Drummey, supra, 13 Cal.2d at p. 85, italics added)-plainly casts upon "the complaining party" (and not the administrative agency) a burden of proof or persuasion, and not a mere burden of production or of coming forward with evidence.

In support of its contrary holding, the Court of Appeal stated, and Fukuda now contends, that the statutory presumption that "official duty has been regularly performed" (Evid. Code, 664)-which, as noted above, was cited in Drummey as an important factor, along with administrative expertise, in explaining why administrative findings are presumed to be correct (13 Cal.2d at p. 86)-" ' goes only to the burden of producing evidence.' " (Quoting Kleist v. City of Glendale (1976) 56 Cal.App.3d 770, 777 [128 Cal.Rptr. 781] (Kleist), italics added.) Hence, it is argued, any burden recognized by Drummey should be seen as one of mere production, and not persuasion. The Court of Appeal's premise is questionable: Evidence Code section 664 long has been classified by the Legislature as a presumption affecting the burden of proof (defined in Evid. Code, 605, 660 et seq. [listing presumptions affecting burden of proof]), rather than one affecting *821 the burden of producing evidence (defined in Evid. Code, 603, 630 et seq. [listing presumptions affecting burden of producing evidence].) In any event, regardless whether the section 664 presumption properly may be characterized, as implied by the opinion of the Court of Appeal and asserted here by Fukuda, as "fall[ing] from the case" if and when the petitioner presents an adequate record on review, [FN13] the " strong presumption" of the correctness of administrative findings that we articulated in Drummey is separate and different in nature, and based upon additional considerations-including our observation that such findings often are the product of expertise. Indeed, it is clear from Drummey that we did not contemplate that the presumption would "drop out" once the petitioner met his or her burden of production: As noted above, our opinion spoke of the trial court's obligation to apply the presumption even though it was clear that the burden of production had been satisfied. (Drummey, supra, 13 Cal.2d at pp. 86, 88.) [FN14]

> FN13 The Court of Appeal relied upon the following statement in Kleist, supra, 56 Cal.App.3d at page 777: "The presumption of performance of official duty, contained in Evidence Code section 664, goes only to the burden of producing evidence ...." As the City observes, however, the Evidence Code itself, and other decisions construing the code, are to the contrary. (Evid. Code, 660 et seq.; Davenport v. Department of Motor Vehicles (1992) 6 Cal.App.4th 133, 143 [7 Cal.Rptr.2d 818] ["The presumption in Evidence Code section 664 affects the burden of proof."].)

> FN14 To satisfy its burden of production at the administrative hearing, the public agency must produce evidence of misconduct by the employee. Unless it does so, the employee has no burden to produce evidence that no misconduct occurred. To satisfy his or her burden of production at the administrative mandamus hearing under section 1094.5, the employee need only produce a complete

> record of the administrative hearing-and this record will, in any event, be prepared by the agency. (See Code Civ. Proc., 1094.6, subd. (o).)

Other objections noted by the Court of Appeal and raised here by Fukuda may be disposed of quickly.

Fukuda suggests that because section 1094.5, as adopted (and as it exists today), does not expressly codify the presumption of correctness set out in Drummey, it should be inferred that the Legislature did not intend to adopt that rule. The legislative history-including the Judicial Council's 1944 Report, discussed ante, in part II.B, and the Legislature's failure to amend the statute to avoid the limitations set out in Drummey and its progeny- demonstrates otherwise.

Fukuda and amicus curiae on his behalf assert in conclusory fashion that the limitations on independent judgment review, articulated in Drummey and its progeny, should be ignored, because they allegedly constituted dictum when first set out in Drummey. Our opinion in Drummey affirmed the issuance of a peremptory writ of mandate. We could not have done so without deciding whether the trial court had proceeded in a manner that *822 respected and took into account the presumption discussed in our opinion. As noted above, we expressly found that the trial court properly did so proceed, and exercised its independent judgment. The challenged aspect of Drummey was not dictum. Even if this were not so, the subsequent adoption of the challenged presumption and burden allocation by Dare and Sipper, their acceptance by the Legislature, and the subsequent reaffirmation of the challenged presumption and burden allocation by Bixby more than adequately establish the bona fides of the challenged presumption and burden allocation today.

Fukuda and amicus curiae on his behalf assert that the existence of the " presumption of correctness" has not been accepted and that the presumption has been "ignored" in practice. We find no support in the record for this assertion. Our opinion herein will reaffirm for the future that the presumption continues to exist.

Fukuda suggests that constitutional considerations preclude any limitation (such as the challenged presumption, or the challenged allocation of the burden of proof) on a trial court's exercise of independent judgment. There was no authority for this proposition when Drummey was decided, and there is none now. Indeed, the more recent decisions suggest that the independent judgment test itself is not constitutionally compelled, even in cases substantially affecting fundamental vested rights, when, as here, the underlying administrative procedure includes ample safeguards designed to ensure fairness. (Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal.3d 335, 346 [156 Cal.Rptr. 1, 595 P.2d 579] (Tex-Cal).) [FN15]

> FN15 The reasoning of the plurality opinion in Tex-Cal, supra, 24 Cal.3d 335, casts doubt on the suggestion in Drummey, supra, 13 Cal.2d at pages 84-85, that the independent judgment standard of judicial review is compelled by the due process clauses of the state and federal Constitutions, and the suggestion in Laisne, supra, 19 Cal.2d at pages 834-845, that the independent judgment standard of review, and a trial de novo, are required by separation of powers considerations. Fukuda asserts that "recent decisions" by the United States Supreme Court have " affirmed" that independent judgment review is required by the due process clause, but he cites no authority for that proposition and we are aware of none.

Finally, Fukuda asserts that the judicial "trend" is to expand the scope of writ of mandate review by the trial court, and not to "confer more power" on administrative agencies. Our task is to construe the statute, not to discern trends. In any event, both Tex-Cal, supra, 24 Cal.3d 335, and recently enacted Government Code section 11425.50, subdivision (b) (discussed and quoted ante, at p. 819), refute the suggested existence of such a judicial or legislative "trend." *823

IV

The City, joined by amici curiae, [FN16] urges this court to reconsider and abandon Drummey's "independent judgment" standard of review and the case law that has developed to guide courts in administering and implementing that standard. They suggest that the independent judgment test is not constitutionally compelled, and that its use is not generally required in any other jurisdiction, state or federal. They argue, among other things, that (i) our case law is illogical in requiring independent judgment review of fundamental vested rights determined by local and many statewide agencies, but permitting substantial evidence review of the decisions of constitutional agencies; (ii) our case law creates confusion as to what sorts of interests are "fundamental" and "vested" and hence trigger

independent judgment review; (iii) use of the independent judgment standard of review imposes increased and unnecessary burdens on our congested trial courts; (iv) use of independent judgment review frequently calls upon trial court judges, as generalists, to substitute their judgment for the more qualified judgment of expert administrators, and promotes disparate results when similar cases from the same agency are heard by different trial court judges; and (v) use of the independent judgment standard of review is not necessary in order to safeguard individual liberties.

FN16 Briefs proposing that we abandon independent judgment review have been filed by UCLA Law School Professor Michael Asimow and the California School Boards Association (joined by 84 California cities). The Attorney General has filed a brief in which he "agrees with Professor Asimow ... that it is time for this Court to reexamine the scope of review of administrative mandamus proceedings." Briefs urging us to retain independent judgment review have been filed by Lackie & Dammeier LLP (a law firm that represents public employee unions, associations, and related groups), and the Peace Officers' Research Association of California Legal Defense Fund et al.

We considered and rejected most of these arguments almost three decades ago, in Bixby, supra, 4 Cal.3d 130. As we have seen, the independent judgment standard of review was first articulated in decisions issued in the 1930's and early 1940's; in 1942, the voters of this state rejected a proposed constitutional amendment that would have modified those decisions; and in 1945, the Legislature, relying upon a comprehensive report that carefully reviewed the governing cases, essentially codified the independent judgment standard of review through its enactment of section 1094.5. For more than half a century, California courts have applied that standard of review, in accordance with the provisions of section 1094.5. Under these circumstances, we believe that those who advocate abandonment of the independent judgment standard of review on the basis of policy appropriately should *824 direct their concerns and arguments for revision to the Legislature, rather than to this court. [FN17]

FN17 We observe that the Legislature has been free for the past two decades to specify, consistently with Tex-Cal, supra, 24 Cal.3d 335, 346, that certain administrative determinations need to be subjected only to substantial evidence review rather than independent judgment review. During that period, the Legislature selectively has acted to so specify with regard to some agency decisions (see Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies, supra, 42 UCLA L.Rev. 1157, 1176, fn. 62), but expressly has mandated independent judgment review with regard to other agency determinations, including those concerning dismissal of public school teachers. (Ibid.; Ed. Code, 44945, 87682.)

V

(4) Even when, as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. (Drummey, supra, 13 Cal.2d at p. 86; Yakov v. Board of Medical Examiners (1968) 68 Cal.2d 67, 72-75 [64 Cal.Rptr. 785, 435 P.2d 553].) (5) In the present case, however, we cannot properly review the trial court's findings and decision for substantial evidence, because that court's findings are themselves infected by fundamental error: The trial court erred by placing the burden of proof on the City, and by failing to accord a presumption of correctness to the administrative findings.

Fukuda asserts that we nevertheless may affirm the judgment because, he claims, the trial court's misallocation of the burden of proof and apparent failure to presume the correctness of the administrative findings did not affect its decision. The record, however, does not support this contention, and instead demonstrates that the trial court relied repeatedly upon the City's failure to meet its burden of proof. Indeed, the trial court stressed that, with regard to the question whether Fukuda's involvement in the pursuit was " unreasonably dangerous," the evidence was "evenly balanced, and the party having the burden of proof loses." As Fukuda concedes, "had [he] bor[ne] the burden of proof as to this charge, the finding would have been sustained ... against [him]"-and as the City observes, that finding, in conjunction with the sustained finding that Fukuda engaged in a prohibited roadblock, may have supported the city council's termination decision. Accordingly, and in view of the trial court's misallocation of the burden of proof, and the administrative findings of dishonesty on the part of Fukuda, it would be inappropriate at this point to affirm the trial court's judgment barring termination of Fukuda's employment.

At the same time, however, we also reject the City's suggestion that we may reverse the judgment and reinstate the city council's decision to terminate Fukuda's employment, on the ground that the evidence amply supports *825 the administrative findings. On the record before us, we cannot foreclose the possibility that the trial court, after exercising its independent judgment as described above, reasonably could conclude that the city council's termination decision was an abuse of discretion. (See Magit v. Board of Medical Examiners (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816].)

We reverse the judgment of the Court of Appeal and direct that court to remand the matter to the trial court for further proceedings consistent with this opinion.

Mosk, J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Brown, J., concurred. *826

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END OF DOCUMENT

EXHIBIT K

WEST'S ANNOTATED CALIFORNIA CODES
CODE OF CIVIL PROCEDURE
PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE
TITLE 1. OF WRITS OF REVIEW, MANDATE, AND PROHIBITION
CHAPTER 2. WRIT OF MANDATE

Current through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.

§ 1094.5. Review of administrative orders or decisions; filing record; extent of injury; abuse of discretion; relevant evidence; judgment; stay; disposal of administrative records

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code or governing bodies of municipal hospitals formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.

(e) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ.

Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. The application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h)(1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits. The application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(2) The standard set forth in this subdivision for obtaining a stay shall apply to any administrative order or decision of an agency that issues licenses pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act. With respect to orders or decisions of other state agencies, the standard in this subdivision shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of Section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply.

(3) If an appeal is taken from a denial of the writ, the order or decision of the hospital or agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the hospital or agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(i) Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

(j) Effective January 1, 1996, this subdivision shall apply to state employees in State Bargaining Unit 5. This subdivision shall apply to state employees in State Bargaining Unit 8. For purposes of this section, the court is not

authorized to review any disciplinary decisions reached pursuant to Section 19576.1 or 19576.5 of the Government Code.

CREDIT(S)

1980 Main Volume

(Added by Stats.1945, c. 868, p. 1636, § 1. Amended by Stats.1949, c. 358, p. 638, § 1; Stats.1974, c. 688, p. 1532, § 1; Stats.1975, 2nd Ex.Sess., c. 1, p. 3973, § 26.5; Stats.1978, c. 1348, § 1; Stats.1979, c. 199, § 1.)

2000 Electronic Update

(Amended by Stats.1982, c. 193, p. 593, § 4, eff. May 5, 1982; Stats.1982, c. 812, p. 3102, § 3; Stats.1985, c. 324, § 1; Stats.1991, c. 1090 (A.B.1484), § 5.5; Stats.1992, c. 72 (A.B.1525), § 1, eff. May 28, 1992; Stats.1995, c. 768 (S.B.544), § 1, eff. Oct. 12, 1995; Stats.1998, c. 88 (A.B.528), § 5, eff. June 30, 1998; Stats.1998, c. 1024 (A.B.1291), § 5, eff. Sept. 30, 1998; Stats.1999, c. 446 (A.B.1013), § 1, eff. Sept. 21, 1999.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2000 Electronic Update

1982 Amendment.

Chapter 193 added the third, fourth and fifth sentences of subd. (a); and substituted "20" for "twenty (20)" in subds. (g) and (h) (3).

Chapter 812 amended chapter 193 by adding "or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code" to the first sentence of subd. (d); and changing the citation in subd. (h) (1) from "Part 1 (commencing with Section 11500) of Division 3 of Title 2" to "Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2".

1985 Amendment. Substituted "administrative law judge" for "hearing officer" in subd. (h)(1) and (2); and made nonsubstantive changes throughout the section to improve syntax.

1991 Legislation

The 1991 amendment added subd. (i) relating to disposal of administrative records.

1992 Legislation

The 1992 amendment inserted in subd. (d) the reference to governing bodies of municipal hospitals formed pursuant to Govt.C. §§ 37600 et seq., and 37650 et seq.

1995 Legislation

The 1995 amendment added subd. (j), relating to application of the section to specified state employees and court review of disciplinary decisions.

1998 Legislation

Stats.1998, c. 88, rewrote subd. (j) and made nonsubstantive changes. Prior to amendment, subd. (j) read:

"(j) Effective January 1, 1996, this subdivision shall apply only to state employees in State Bargaining Unit 5. For

purposes of this section, the court is not authorized to review any disciplinary decisions reached pursuant to Section 19576.1 of the Government Code."

Stats.1998, c. 1024, § 5, incorporated the changes from c. 88 and in subd. (j), inserted the reference to Government Code § 19576.5.

Stats.1998, c. 1024, § 1, legislative declaration; §§ 2 to 4, memorandum of understanding pertaining to CDF firefighters; §§ 58, 59 pertaining to funding adjustments; see Historical and Statutory Notes under Government Code § 3517.6.

1999 Legislation

Stats.1999, c. 446 (A.B.1013), in subd. (j), at the beginning of the second sentence, deleted "Effective June 1, 1998,"; and, in the last sentence, following "19576.1" deleted ", 19576.2,".

1980 Main Volume

In 1949 subd. (f) [now subd. (g)] was amended to authorize a stay "until the filing of a notice of appeal from the judgment of until the expiration of the time for filing such notice whichever occurs first", and a proviso was added to the sentence dealing with appeal from a denial of the writ.

The 1974 amendment added the second proviso at the end of the first sentence in subd. (f) [now subd. (g)].

The 1975 amendment added sbd. (g) [now subd. (h)].

The 1978 amendment inserted subd. (d); relettered former subds. (d), (e), (f) and (g) as subds. (e), (f), (g) and (h); substituted the citation in subd. (e) "subdivision (f)" for "subdivision (e)"; substituted the citation in subd. (g) "subdivision (h)" for "subdivision (g)" and inserted in subd. (h) provisions relating to licensed hospitals.

The 1979 amendment substituted, in subd. (h), "any state agency" and "agency" for, respectively, "any licensing board" and "licensing board"; substituted, in subd. (h)(1) preceding the word "pending", the present provision for "The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any licensing board respecting any person licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, except Chapter 11 (commencing with Section 4800) thereof, or licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act"; and added subd. (h)(2).

WEST'S CALIFORNIA CODE FORMS

1980 Main Volume

See West's California Code Forms, Civil Procedure.

CROSS REFERENCES

Air pollution control hearing board decisions, see Health and Safety Code § 40864.

California coastal commission, writs of mandate in accordance with this section, see Public Resources Code §§ 30801, 30802.

Civil service proceedings, failure to apply for rehearing, see Government Code § 19588.

Energy conservation and development, writ of mandate for review, see Public Resources Code § 25901.

Housing discrimination, review of final order for relief, see Government Code § 12987.1.

Judicial review of administrative adjudication, see Government Code § 11523.

Medical malpractice insurance, action for declaration of rights and duties, see Code of Civil Procedure § 1062.5.

Medical practice act, action when school not approved or applicant rejected, see Business and Professions Code § 2174.

Oil and gas conservation, violations, civil penalty, see Public Resources Code § 3236.5.

Public services, decision of director of state department of social services affecting rights of applicants or recipients, see Welfare and Institutions Code § 10962.

Stay on review of proceeding for writ, see Code of Civil Procedure § 1110b.

Suisun marsh preservation, decisions or actions by San Francisco Bay Conservation and Development Commission, see Public Resources Code §§ 29602, 29603.

Surface mining and reclamation, hearings, petition for writ of mandate, see Public Resources Code § 2774.4.

Volunteer firefighters, removal hearings, setting aside decision, see Labor Code § 1964.

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UNITED STATES SUPREME COURT

Federal-question jurisdiction, supplemental jurisdiction over state claims, deferential review of state administrative findings, see City of Chicago v. Intern. College of Surgeons, U.S.Ill.1997, 118 S.Ct. 523.

NOTES OF DECISIONS

I. IN GENERAL

<Subdivision Index>

1. Validity

This section does not violate due process or equal protection of law. Gaenslen v. Board of Directors of St. Mary's Hosp. and Medical Center (App. 1 Dist. 1985) 232 Cal.Rptr. 239, 185 Cal.App.3d 563.

The 1978 amendment providing that standard of review for appeals from private hospital awards is whether findings are supported by substantial evidence, which amendment was purely procedural in both substance and effect, was applicable on retrial some year and one-half after effective date of amendment and did not constitute either invalid retroactive legislation or a bill of attainder. Anton v. San Antonio Community Hosp. (App. 4 Dist. 1982) 183 Cal.Rptr. 423, 132 Cal.App.3d 638.

Subd. (h) (1) of this section granting power to stay operation of administrative order suspending license of doctor to practice medicine is not an unconstitutional grant of judicial power to administrative agency nor unconstitutional invasion of judiciary's power. Board of Medical Quality Assur. v. Superior Court of Fresno County (App. 5 Dist. 1980) 170 Cal.Rptr. 468, 114 Cal.App.3d 272.

This section concerning review of administrative orders or decisions was constitutional as applied to facts of case wherein doctor sought writ of mandate directing board of medical examiners to vacate and annul its order revoking his license to practice medicine and surgery for professional misconduct. Shakin v. Board of Medical Examiners (App. 2 Dist. 1967) 62 Cal.Rptr. 274, 254 Cal.App.2d 102, appeal dismissed, certiorari denied 88 S.Ct. 1112, 390 U.S. 410, 19 L.Ed.2d 1272.

2. Construction and application

An abuse of discretion in a public agency's application of its land-use regulations certainly cannot be determined without reviewing the manner in which it was exercised. City of Burbank v. Burbank-Glendale-Pasadena Airport Authority (App. 2 Dist. 1999) 85 Cal.Rptr.2d 28, 72 Cal.App.4th 366, rehearing denied, review denied.

When person affected by administrative adjudication challenges adjudicatory administrative action of state-level

193 Cal.App.3d 1248
239 Cal.Rptr. 18
(Cite as: 193 Cal.App.3d 1248)

DARRYL MOUNGER et al., Plaintiffs and Appellants,
v.
DARYL F. GATES, as Chief of Police, etc., et al., Defendants and Respondents

No. B022737.

Court of Appeal, Second District, California.

Jul 29, 1987.

SUMMARY

A police officer and a police protective league brought a suit for declaratory and injunctive relief against the police department and various police officials, alleging that the officer's rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3311) were violated during interrogations of him by the department's internal affairs division as part of an investigation into alleged misconduct. The trial court sustained demurrers without leave to amend as to five of the nine counts of the second amended complaint, on the ground that the officer had failed to exhaust administrative remedies prior to bringing the lawsuit. (Superior Court of Los Angeles County, No. C 528306, Robert H. O'Brien, Judge.)

Treating the purported appeal from the nonappealable order sustaining the demurrer as a petition for mandate, the Court of Appeal directed issuance of the writ commanding the trial court to deny the demurrer as to the five counts, and to determine the appropriateness of an award of attorney fees in plaintiffs' favor. It held that the officer was not required to exhaust administrative remedies prior to bringing a judicial action, since the express language of Gov. Code, § 3309.5, subd. (b), provides that the superior court has initial jurisdiction over actions alleging violations of the act. Moreover, it held the officer could simultaneously pursue both judicial and administrative remedies for violations. It further held that the case was not rendered moot by the department's adoption of a temporary procedure regarding the availability of statements prior to an accused officer's interview, since the policy addressed only one of the alleged violations, and since the action sought permanent policy changes. Finally, it held that plaintiff satisfied two prerequisites to an award of attorney fees on appeal, pursuant to Code Civ. Proc., § 1021.5, in that the case involved issues of statewide concern affecting the public interest and benefited a large class of persons, but it remanded for determination of plaintiffs' financial burden in bringing the action and the monetary benefits, if any, that would accrue from an award. (Opinion by Johnson, J., with Thompson, J., concurring. Separate dissenting opinion by Lillie, P. J.) *1249

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 23--Decisions Appealable--Orders on Demurrer.
A minute order sustaining a demurrer without leave to amend is not appealable. Appeal may be had only from a judgment of dismissal based upon the sustaining of a demurrer.

(2) Appellate Review § 15--Decisions Appealable--Final Judgments and Orders--What Constitutes Finality--Demurrer Disposing of Less Than All Counts.
In an action based on a complaint containing nine counts, in which the trial court disposed of only five of the nine counts in ruling on defendant's demurrer, a judgment of dismissal could not be properly issued without violating the one-final-judgment rule.

(3) Appellate Review § 116--Dismissal--Determination on Merits Despite Grounds for Dismissal--Purported Appeal from Nonappealable Order Treated as Petition for Writ of Mandate.
A purported appeal from a nonappealable order, sustaining without leave to amend a demurrer to five of nine counts of a complaint brought under the Public Safety Officers Procedural Bill of Rights Act, was treated as a petition for a writ of mandate, since the action presented a question of public importance, in that it presented matters of statewide concern affecting the public interest in promoting stable employer-employee relations in public safety organizations and involving procedural protections for public safety officers, since the parties had fully briefed the propriety of the trial court's ruling, and since respondent did not challenge its appealability.

(4a, 4b, 4c) Law Enforcement Officers § 12--Police--Disciplinary Proceedings--Appeal--Exhaustion of Administrative Remedies.
A police officer who alleged in a nine-count complaint that the department's internal affairs division violated his rights, as set forth in Gov. Code, § 3303, during its interrogations of him as part of an investigation into

alleged misconduct, was not required to exhaust any administrative remedies prior to initiating a court action for declaratory and injunctive relief against such violations. The express language of Gov. Code, § 3309.5, subd. (b), provides that the superior court has initial jurisdiction over such actions, and it was enacted specifically so that law enforcement officers would not be required to wait for judicial review after administrative consideration of alleged violations of § 3303. Further, he did not waive his right to immediate judicial relief by electing to simultaneously pursue an administrative appeal from the discipline *1250 imposed, since nothing in § 3309.5 states that an officer must elect between administrative and judicial remedies.

[See Cal.Jur.3d, Law Enforcement Officers, § 32 et seq.; Am.Jur.2d, Sheriffs, Police, and Constables, § 37 et seq.]

(5) Appellate Review § 128--Scope and Extent--Rulings on Demurrers.
In reviewing the sufficiency of a complaint against a demurrer, the appellate court must treat the demurrer as admitting all facts properly pleaded, but not contentions, deductions or conclusions of fact or law, and must consider matters which may be judicially noticed. When a demurrer is sustained, the appellate court determines whether the complaint states facts sufficient to constitute a cause of action. It must affirm if any ground raised by defendants requires the sustaining of the demurrer, whether or not the trial court specified all the grounds. Further, unless clear error or abuse of discretion is demonstrated, the trial court's judgment of dismissal following the sustaining of the defendant's demurrer will be affirmed on appeal.

(6) Administrative Law § 89--Exhaustion of Administrative Remedies-- Exceptions.
The doctrine of exhaustion of administrative remedies does not apply if the remedy is inadequate.

(7) Appellate Review § 120--Dismissal--Grounds--Mootness--What Constitutes.
Five counts of a nine-count complaint by a police officer and police protective league against the police department and certain of its officials, alleging that the department's internal affairs division violated the officer's procedural rights as set forth in Gov. Code, § 3303, during its interrogations of him as part of an investigation into alleged misconduct, were not rendered moot by the department's adoption of a temporary procedure regarding the availability of statements prior to an accused officer's interview. The complaint alleged other violations of the officer's rights, in addition to the department's denying him access to transcribed statements, and whether the temporary procedure had actually been implemented was a question of fact for the trial court. In any event, the implementation of a temporary procedure could not render the lawsuit moot, since it was aimed at a permanent change in procedure.

(8a, 8b) Costs § 7--Attorney Fees--Enforcement of Rights Affecting Public Interest and Benefiting Large Class of Persons.
A lawsuit by a police officer and police protective league, seeking a judicial declaration and enforcement of the officer's rights, as set forth in Gov. Code, § 3303, during interrogations by the police department's internal *1251 affairs division, furthered the public interest and benefited a large class of persons, thus satisfying two prerequisites to an award of attorney fees on appeal, pursuant to Code Civ. Proc., § 1021.5. The rights and protections in the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3311) are matters of statewide concern, and are thus sufficiently important to justify the award. Further, a decision in the officer's favor benefited all public safety officers in the state, as well as the citizenry as a whole, by promoting stable employer- employee relations in public safety organizations.

(9) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Procedural Safeguards.
The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300- 3311) specifies the basic rights and protections which must be afforded all peace officers by the public entities that employ them. It is a catalogue of the minimum rights the Legislature deems necessary to secure stable employer- employee relations.

COUNSEL

Robert J. Loew, Loew & Marr, Cecil Marr and Diane Marchant for Appellants and Plaintiffs.

James K. Hahn, City Attorney, Frederick N. Merkin, Assistant City Attorney, and S. David Hotchkiss, Deputy City Attorney, for Respondents and Defendants.

JOHNSON, J.

Darryl Mounger and the Los Angeles Police Protective League (LAPPL) appeal from an order sustaining a demurrer without leave to amend to the

first through fifth causes of action in the second amended complaint seeking injunctive and declaratory relief for alleged violations of section 3303 of the Government Code. The question on appeal is whether Goverment Code section 3309.5 [FN1] requires appellant Mounger to exhaust his *1252 administrative remedies before seeking judicial relief. For the reasons set forth below, we conclude the trial court erred. Since the parties appeal from a nonappealable order, we will treat the purported appeal as a petition for writ of mandate and issue a peremptory writ of mandate directing the trial court to vacate the order sustaining the demurrer without leave to amend to counts one through five. We will continue to refer to the parties as appellants and respondents.

FN1 Section 3309.5 states in pertinent part: "(a) It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to them by this chapter.
"(b) The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this section.
"(c) In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer."
All subsequent statutory citations refer to the Government Code unless otherwise indicated.

Statement of Fact and Proceedings Below

Plaintiffs alleged in their second amended complaint Mounger, a sergeant in the Los Angeles Police Department, was the subject of an investigation by the Internal Affairs Division (IAD) for misconduct. Mounger was interrogated by the IAD on three separate occasions. In count one Mounger claimed certain violations of section 3303 occurred during his interrogation on October 26, 1984. These violations included not being informed prior to the interrogation of the investigation or of rank, name and command of the officer in charge in violation of subdivision (b), [FN2] not being informed of the nature of the investigation in violation of subdivision (c), [FN3] not being allowed to tape record the interrogation and denied access to copies of others' transcribed notes, reports, or complaints in violation of subdivision (f), [FN4] not being advised of his constitutional rights even though he might be charged with a criminal offense in violation of subdivision (g), [FN5] and not being allowed *1253 the opportunity to have a representative present in violation of subdivision (h). [FN6]

FN2 Section 3303, subdivision (b) provides: "The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time."

FN3 Section 3303, subdivision (c) states: "The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation."

FN4 Section 3303, subdivision (f) reads: "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation."

FN5 Section 3303, subdivision (g) states: "If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights."

FN6 Section 3303, subdivision (h) provides: "Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result

> in punitive action against any public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters. ..."

In count two Mounger alleged he was interrogated on October 29, 1984, by more than two interrogators at one time in violation of subdivision (b), was denied access to copies of transcribed notes, reports or complaints in violation of subdivision (f), and was interrogated after exercising his right to remain silent.

Mounger alleged in count three he was again interrogated on November 8, 1984, by more than two interrogators at one time in violation of subdivision (b), was interrogated after exercising his right to remain silent under compulsion in violation of subdivision (g), and was denied access to copies of transcribed notes, reports or complaints of investigators or other persons in violation of subdivision (f).

In count four LAPPL [FN7] alleged the Los Angeles Police Department routinely violated subsection (g) by compelling officers to be interrogated even though they had invoked their constitutional rights and by denying them access to copies of materials enumerated in subdivision (f) on the basis of confidentiality. Mounger and LAPPL sought declaratory relief in count five. Defendants demurred on the ground counts one through five were moot as to Mounger.

> FN7 In count five both Mounger and LAPPL sought declaratory relief pursuant to section 1060 (Code Civ. Proc.) determining the rights and duties of the respective parties in this controversy. Because we conclude the trial court erred in sustaining the demurrer without leave to amend with respect to Mounger on the ground of not exhausting his administrative remedy, a fortiori the trial court erred in ruling on this ground with respect to counts four and five alleged by LAPPL.

The trial court sustained the demurrer without leave to amend to counts one through five on the ground Mounger had agreed in argument he had not exhausted his administrative remedies. At the hearing on the demurrer the trial court sustained it entirely to counts one through five, making no distinction between counts alleged by Mounger and those alleged by LAPPL. The court made no distinction between counts alleged by Mounger and those alleged by LAPPL. It ruled counts six and eight stated causes of action as to Tuller, Lombardo and Butz for conspiracy and invasion of *1254 privacy and intentional infliction of emotional distress. It further ruled plaintiffs stated a cause of action for negligent management, control, training and supervision in count seven as to Gates and granted leave to amend count nine.

(1) Appellants appeal from a minute order sustaining the demurrer without leave to amend which is not appealable. (Beazell v. Schrader (1963) 59 Cal.2d 577, 579 [30 Cal.Rptr. 534, 381 P.2d 390].) They may appeal only from a judgment of dismissal based upon the sustaining of a demurrer. (Taylor v. State Personnel Board (1980) 101 Cal.App.3d 498, 501, fn. 1 [161 Cal.Rptr. 677].) (2) A judgment of dismissal could not properly issue in the instant case without violating the one-final-judgment rule because the trial court had disposed of only five of the nine counts in the complaint. (U.S. Financial v. Sullivan (1974) 37 Cal.App.3d 5, 11 [112 Cal.Rptr. 18].) (3) Rather than dismiss the appeal, we treat the purported appeal as a petition for writ of mandate because it presents a question of public importance (see Estate of Hearst (1977) 67 Cal.App.3d 777, 781 [136 Cal.Rptr. 821] [treated appeal as petition for writ of certiorari because involved question of public importance]; 8 Witkin, Cal. Procedure (3d ed. 1985) Extraordinary Writs, § 118, pp. 753-757); the parties have fully briefed the propriety of the trial court's ruling (U.S. Financial v. Sullivan, supra, 37 Cal.App.3d at p. 11); and respondent did not challenge its appealability (Poe v. Diamond (1987) 191 Cal.App.3d 1394, 1398 [237 Cal.Rptr. 80]; Estate of Hoertkorn (1979) 88 Cal.App.3d 461, 463 fn. 1 [151 Cal.Rptr. 806].) We find the circumstances here compel us to decide the issue presented. (See Olson v. Cory (1983) 35 Cal.3d 390, 401 [197 Cal.Rptr. 843, 673 P.2d 720]; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 62-63, pp. 86-88.) As we discuss inter alia the rights and protections at issue in this case are matters of statewide concern because they affect the public interest in promoting stable employer-employee relations in public safety organizations and assure procedural protections for public safety officers.

I. The Trial Court Erred in Sustaining the Demurrer Without Leave to Amend to the First Five Causes of Action on the Ground

Mounger Had Not Exhausted His Administrative Remedies.

(4a) Appellants contend the trial court erred in applying the exhaustion doctrine to alleged violations of section 3303. We agree.

(5) In reviewing the sufficiency of a complaint against a demurrer we must "'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law ... [as well as] consider matters which may be judicially noticed.'" (Blank v. Kirwan *1255 (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58], quoting Serrano v. Priest (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (Ibid.) However, we must affirm if any ground raised by defendants requires the sustaining of the demurrer whether or not the trial court specified all the grounds. (Gonzales v. State of California (1977) 68 Cal.App.3d 621, 627 [137 Cal.Rptr. 681]; see § 472d, Code Civ. Proc.) Further, "[u]nless clear error or abuse of discretion is demonstrated, the trial court's judgment of dismissal following the sustaining of defendants' demurrer will be affirmed on appeal [citation omitted]." (Owens v. Foundation for Ocean Research (1980) 107 Cal.App.3d 179, 182 [165 Cal.Rptr. 571]; disapproved on another ground in Tenzer v. Superscope, Inc. (1985) 39 Cal.3d 18, 29 [216 Cal.Rptr. 130, 702 P.2d 212].)

(4b) In counts one through three Mounger alleged violations of section 3303, subdivisions (b), (c), (f), (g), and (h). If short, Mounger contends he stated facts sufficient to make out a cause of action for injunctive relief for these departmental violations pursuant to section 3309.5 on the basis they constitute substantial violations of his statutory rights under section 3303. To state a cause of action under section 3309.5 the plaintiff must show the public safety department violated a provision of the chapter (§ 3300 et seq.). We conclude the trial court erroneously imported another element into section 3309.5 when it ruled Mounger must first exhaust any administrative remedies he might have before seeking judicial relief under this section. [FN8]

FN8 We note the only opinion holding exhaustion of administrative remedies is required has been depublished by our Supreme Court. (See Kelly v. City of Fresno (Cal.App.).)

Respondents state they do not contend in all situations an officer must exhaust all administrative remedies prior to seeking judicial relief under section 3309.5, but rather when an officer such as Mounger has elected to proceed with an available administrative remedy which ends in binding arbitration, he or she must first exhaust this remedy before pursuing judicial relief. We find no merit in this contention. There is nothing in section 3309.5 which requires an officer to exhaust his or her administrative remedies if, as in the instant case, that officer also seeks relief through a collective bargaining agreement or other agreed upon procedure. Such a conclusion is contrary to the plain language of the section. Subdivision (b) states: "The *1256 superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this section [italics added]."

The legislative history of section 3309.5 shows it was specifically designed to allow an officer to pursue a remedy immediately in the courts for violation of these rights during the investigation and not be required to wait for judicial review after administrative consideration of those violations. Section 3309.5 was introduced as Assembly Bill 1807 in 1979. A report by the Senate Committee on Judiciary highlighted that the effect of the bill would be to provide peace officers equitable relief by allowing them "immediate access to superior court to enforce their rights under the Act without having to pursue administrative remedies." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1807 (1979-1980 Reg. Sess.) as amended May 17, 1979.) The legal affairs secretary advised the Governor's office in an enrolled bill report the purpose of the bill is to allow immediate judicial relief for police officers instead of requiring them to "exhaust lengthy administrative procedures." (Legal affairs sec., Enrolled Bill Rep., Assem. Bill No. 1807 [July 25, 1979].) The Office of Employee Relations also advised the Governor's office: "This legislation, sponsored by PORAC [Peace Officers Research Association of California], would give initial jurisdiction in alleged violations of the Bill of Rights for local peace officers to superior courts; currently, alleged violations must first be heard by the local law enforcement agency before they are taken to court." (Emp. Rel. Off., Enrolled Bill Rep., Assem. Bill No. 1807 [July 23, 1979].) We think it clear the Legislature intended with the passage of section 3309.5 to eliminate the requirement peace officers must exhaust their administrative remedies for alleged violations of the act before seeking judicial relief.

In any event, the administrative appeal Mounger elected to pursue was from the discipline imposed and not from the violation of his procedural rights during the interrogation. (6) The doctrine of exhaustion of administrative remedies "does not apply if the remedy is inadequate." (Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal.3d 328, 342 [124 Cal.Rptr. 513, 540 P.2d 609].) The instant case is unlike Cone v. Union Oil Co. (1954) 129 Cal.App.2d 558 [277 P.2d 464]. In that case plaintiff was precluded from maintaining her action because a strike settlement agreement required her to exhaust grievance and arbitration procedures in an effort to settle disputes within the scope of the contract before pursuing a judicial remedy. (Id., at p. 563.) (4c) In contrast, Mounger's claim is *1257 based on statutory rights provided by section 3303 not in a collective bargaining agreement. [FN9]

FN9 At oral argument respondents contended section 3303 does not apply because the interrogations occurred during a criminal investigation. We think this contention is a red herring. First, appellants are appealing from a judgment of dismissal following the sustaining of a demurrer without leave to amend and the complaint does not allege the violations occurred during an investigation concerned solely with alleged criminal violations. Second, subdivision (h) which gives an officer the right to choose a representative does not apply in "an investigation concerned solely and directly with alleged criminal activities."

Similarly respondents' contention Mounger waived his right to seek judicial relief pursuant to section 3309.5 when he elected to simultaneously pursue his administrative remedy is meritless. Nothing in section 3309.5 states an officer must elect between seeking administrative relief for a departmental disciplinary action and seeking judicial relief for alleged procedural violations. To conclude as respondents argue would require an officer to forego either his or her contract right to appeal a departmental action or his or her statutory rights to fair procedures under section 3303. We agree with appellants section 3309.5 guarantees immediate judicial attention to alleged violations of the act. We hold officers do not waive their statutory rights under section 3309.5 by choosing to proceed contemporaneously with an administrative appeal of the discipline imposed against them.

II. This Appeal Is Not Moot.

(7) Respondents asked this court to take judicial notice (Evid. Code, §§ 452, subd. (b); 459) of a memorandum issued by the Chief of the Los Angeles Police Department concerning its adoption of a procedure regarding the availability of statements regarding the allegation prior to an accused officer's interview pursuant to section 3303, subdivision (f). This court granted that motion. Respondents contend this memorandum entitled "Temporary Procedure Regarding Availability of Statements Prior to Accused Officer's Interview" renders moot counts one through five.

We conclude from our review of the memorandum it does not render moot the issue in the instant case. The memorandum states its purpose is "to implement a temporary Department procedure which conforms to a recent superior court interpretation of Government Code Section (GC) 3303 (f)." (Italics added.) In their complaint plaintiffs alleged violations of subsections (b), (c), (g), and (h) in addition to (f). For this reason alone, respondents' contention is meritless. Moreover, whether this temporary procedure for subdivision (f) actually has been implemented would be a factual *1258 matter for the trial court to determine not something to be resolved at the pleading stage. In any event the implementation of a temporary procedure cannot render moot a lawsuit aimed at a permanent change in procedure.

III. This Cause Is Remanded to Trial Court for Consideration of Award of Attorneys' Fees for Public Interest.

Appellants request this court award them attorneys' fees on the appeal only [FN10] pursuant to section 1021.5 (Code Civ. Proc.). [FN11] This section authorizes the trial court to compel the losing party to pay attorneys' fees to the prevailing party when (1) the action results in the enforcement of an important right affecting the public interest; (2) the general public or a large class of persons will significantly benefit from the decision; (3) the necessity and financial burden of private enforcement make the award appropriate; and (4) in the interests of justice the fees should not be paid out of the recovery. (Los Angeles Police Protective League v. City of Los Angeles, supra, 188 Cal.App.3d at p. 6; § 1021.5, Code Civ. Proc.) In the instant case the trial court did not consider this matter.

FN10 Appellants appropriately do not request an attorney fee award for legal work performed in the trial court. The relief appellants sought and the issues they raised in the trial court would not have warranted a fee award under section 1021.5. But when the

trial court sustained the demurrer for failure to exhaust administrative remedies - or on grounds appellants had elected an administrative remedy - it created legal issues at the appellate level which could justify an award for the lawyers' efforts during that phase of the proceedings. (For discussion of this distinction, see Los Angeles Police Protective League v. City of Los Angeles (1986) 188 Cal.App.3d 1, 17 [232 Cal.Rptr. 697].)

FN11 Section 1021.5 (Code Civ. Proc.) states as follows: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

We concluded in Los Angeles Police Protective League v. City of Los Angeles (1985) 163 Cal.App.3d 1141, 1150-1151 [209 Cal.Rptr. 890] an appellate court is seldom in a position to make the complete determination whether attorneys' fees should be awarded under section 1021.5. In Los Angeles Police Protective League v. City of Los Angeles, supra, 188 Cal.App.3d at pages 6-7, 11, we decided, however, the appellate court does not have to defer totally to the trial court's resolution of the four elements of the standard in section 1021.5 when the legal work resulted in a published appellate court opinion. In that case we determined the appellate *1259 court often is well situated to decide (1) whether the legal action has a significant impact on the law because it enforces an important legal right, and (2) whether that decision confers a significant benefit on a substantial segment of the citizenry. (Id., at pp. 8-9.)

(8a) We conclude appellants have satisfied the first two elements of the section 1021.5 standard. As to the first, our Supreme Court has concluded the rights and protections in the Public Safety Officers Procedural Bill of Rights Act "are matters of statewide concern" and appellate decisions which announce important principles that make the act more effective are sufficiently important to justify an award. (Baggett v. Gates (1982) 32 Cal.3d 128, 143 [185 Cal.Rptr. 232, 649 P.2d 874].) (9) The Public Safety Officers Procedural Bill of Rights Act (§§ 3300-3311) specifies the "basic rights and protections which must be afforded all peace officers (see § 3301) by the public entities which employ them. It is a catalogue of the minimum rights (§ 3310) the Legislature deems necessary to secure stable employer-employee relations (§ 3301)." (Baggett v. Gates, supra, 32 Cal.3d at p. 135.)

(8b) First, we find it furthers the public interest to allow officers swift judicial review of alleged violations of their basic procedural rights. Our Supreme Court in Baggett v. Gates, supra, 32 Cal.3d at page 143 concluded the rights and protections in the Public Safety Officers Procedural Bill of Rights Act "are matters of statewide concern" and thus are sufficiently important to justify an award. Our decision makes it clear public safety officers do not have to exhaust their administrative remedies before seeking judicial relief for alleged violations of section 3303. Moreover, it holds officers can challenge departmental disciplinary actions in administrative proceedings while simultaneously pursuing judicial remedies for procedural violations. Thus, the rulings embodied in this decision enforce important rights affecting the public interest.

As to the second of the section 1021.5 criteria, this decision benefits not only Mounger but also all public safety officers in the state. This group in itself represents a large class of persons. But beyond that, as the Supreme Court observed in Baggett, the citizenry as a whole benefits from a decision like this which serves the legislative purpose of promoting stable employer- employee relations in public safety organizations. (See Baggett v. Gates, supra, 32 Cal.3d at p. 143.)

Since the trial court did not have occasion to reach the attorney fee issue we do not have evidence before us on the third and fourth criteria of section 1021.5. For instance, we do not know how much appellants expended on their appeal and thus do not know the size of the financial burden required *1260 to pursue private enforcement of the issues involved in this appeal. Nor do we have information as to the monetary benefits, if any, which will accrue to appellant Mounger or appellant Los Angeles Police Protective League, although we can speculate they will be rather small. We observe, however, that neither appellant is ineligible for an attorney fee award merely because the

protective league is a union which may have absorbed all or most of the expenses of this appeal. (See discussion in Los Angeles Police Protective League v. City of Los Angeles, supra, 188 Cal.App.3d at pp. 16-17.) Thus, we remand this cause to the trial court to determine whether appellants satisfy the final two elements required by section 1021.5 and, if met, to set the appropriate amount of appellants' attorney fees on the appeal of this case.

Disposition

We deem the purported appeal a petition for writ of mandate. Let a peremptory writ of mandate issue commanding the superior court to vacate its order of July 2, 1986, and thereafter (1) enter in place thereof an order denying defendants' demurrer to counts one through five and (2) determine whether appellants should be awarded appellate fees. Appellants to receive their costs on appeal.

Thompson, J., concurred.

LILLIE, P. J.

I respectfully dissent. I would dismiss the purported appeal because the minute order sustaining demurrer is a nonappealable order, and I would decline to to make this order reviewable by mandamus. Further, I agree with the ruling of the trial court sustaining the demurrer for Mounger's failure to exhaust his administrative remedies and would deny relief.

I Dismissal of Appeal

Plaintiffs appeal from minute order sustaining demurrer of all named City defendants to counts 1 through 5 of the second amended complaint. The minute order is nonappealable. Only a judgment of dismissal entered on order sustaining demurrer is appealable (Taylor v. State Personnel Bd. (1980) 101 Cal.App.3d 498, 501, fn. 1 [161 Cal.Rptr. 677]); no such judgment was entered in the instant case, and for good reason. The minute order disposed of only five counts of a nine-count complaint of which four counts against the demurring defendants are still pending in the trial court. The court's ruling only could be and properly was embodied in a minute order pending final judgment in the action. Any judgment entered on such an order would not be a final judgment appeal from which would be premature. *1261 (U.S. Financial v. Sullivan (1974) 37 Cal.App.3d 5, 11 [112 Cal.Rptr. 18]; McMillin v. Ventura Sav. & Loan Assn. (1971) 15 Cal.App.3d 588, 589 [93 Cal.Rptr. 359].) There can be but one judgment in an action. (Vasquez v. Superior Court (1971) 4 Cal.3d 800, 806 [94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513]; Bank of America v. Superior Court (1942) 20 Cal.2d 697, 701 [128 P.2d 357]; Mather v. Mather (1936) 5 Cal.2d 617, 618 [55 P.2d 1174]; De Vally v. Kendall de Vally O. Co., Ltd. (1934) 220 Cal. 742, 745 [32 P.2d 638].) Thus, I agree with the majority that to accept appellate jurisdiction in this proceeding is to do violence to the one judgment rule which precludes piecemeal disposition and immediate appellate consideration of rulings prior to the final adjudication of the entire cause. However, I cannot agree, under the circumstances here, that we should salvage this defective appeal by treating it as a proceeding for writ of mandate.

Many authorities view this innovation as a readily available method of assuming review jurisdiction, and uphold this court's power to exercise its discretion to make nonappealable orders reviewable by mandamus (Schultz v. Regents of University of California (1984) 160 Cal.App.3d 768, 788 [206 Cal.Rptr. 910]; Branham v. State Farm Mut. Auto Ins. Co. (1975) 48 Cal.App.3d 27, 32 [121 Cal.Rptr. 304]; Clovis Ready Mix Co. v. Aetna Freight Lines (1972) 25 Cal.App.3d 276, 282 [101 Cal.Rptr. 820]), but they all agree that we should not exercise that power except in "unusual circumstances." (Olson v. Cory (1983) 35 Cal.3d 390, 401 [197 Cal.Rptr. 843, 673 P.2d 720]; U.S. Financial v. Sullivan, supra, 37 Cal.App.3d 5, 12). As stated in U.S. Financial, to justify such treatment, circumstances should be shown "compelling enough to indicate the propriety of a petition for writ of mandate in the first instance. ..." (P. 12.) Otherwise, this practice would obliterate the one final judgment rule.

I perceive here no showing of unusual circumstances and, on the state of the record, this court should decline to assume jurisdiction by invoking the extraordinary writ process. (DeGrandchamp v. Texaco, Inc. (1979) 100 Cal.App.3d 424, 437 [160 Cal.Rptr. 899].) The majority rationalizes its justification for an immediate appellate resolution of the issue raised by the trial court's ruling by construing it as presenting "a question of public importance," citing Estate of Hearst (1977) 67 Cal.App.3d 777, 781 [136 Cal.Rptr. 821], which involved public access to certain court records. Both parties have briefed the issue and it is true, as asserted by the majority, that "respondent did not challenge [the] appealability" of the minute order involved. But that is a fact that troubles me. Respondents may or may not have weighed the question of appealability but, having found the appeal to be premature, we have no way of knowing their views concerning use of

mandamus in these circumstances. Nor do I believe the issue here to be of such "public importance" as to warrant immediate appellate consideration *1262 of the trial court's ruling prior to final adjudication of the entire cause. Further, this is not a situation in which there is no adequate remedy by appeal. When the remaining counts are disposed of by the trial court and a final judgment entered in the case, all issues can then be resolved on appeal.

The second amended complaint contains nine counts each of which rests on facts "common to all," names virtually all demurring defendants and arises out of the same series of administrative hearings. I find nothing in the circumstances here justifying, let alone compelling, the resolution of the issue by way of mandamus. Employment of the writ process in appeals such as this, absent a showing of extraordinary grounds for the issuance of the writ of mandate, should be discouraged as countenancing appellate review of nonappealable orders resulting in piecemeal disposition of causes and fostering shoddy appellate practice.

II Exhaustion of Administrative Remedies

The doctrine of exhaustion of administrative remedies requires a party to use all available administrative procedures before resorting to the courts for relief. (McHugh v. County of Santa Cruz (1973) 33 Cal.App.3d 533, 538 [109 Cal.Rptr. 149].) The exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures, but also requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. (Wilkinson v. Norcal Mutual Ins. Co. (1979) 98 Cal.App.3d 307, 313-314 [159 Cal.Rptr. 416].) The failure to exhaust administrative remedies is a jurisdictional defect which bars court action. (Miller v. United Airlines, Inc. (1985) 174 Cal.App.3d 878, 890 [220 Cal.Rptr. 684]; Barnes v. State Bd. of Equalization (1981) 118 Cal.App.3d 994, 1001 [173 Cal.Rptr. 742].)

While it is true that plaintiff did not allege Mounger had exhausted his administrative remedies and the face of the complaint does not show that he had, it cannot be denied by appellants that he did not. In oral argument on hearing on the demurrer, appellants conceded, as recited by the trial court in its minute order, "that there was an official reprimand with a grievance procedure to follow"; thus, the court found, "counts 1-5 must await administrative remedies being exhausted" and "Insofar as [Government Code section 3303 et seq.] may prevent injunctive relief to proceed without embarking on the administrative route has been waived, demurrer to 1st through 5th counts are [sic] sustained without leave." The purpose of section 3309.5, Government Code, well may be, as asserted in the majority opinion, "to allow immediate judicial relief for police officers instead of *1263 requiring them to 'exhaust lengthy administrative procedures,'" but in my view, the statute does not in all instances change the rule requiring exhaustion of administrative remedies. If the police officer in no manner engaged in the administrative procedure to obtain redress for alleged violations of the Public Safety Officers Procedural Bill of Rights Act (§ 3300 et seq., Gov. Code) and, without pursuing any administrative remedy, sought injunctive relief from the courts in the first instance, i.e., initially, I might agree that under section 3309.5, the superior court would have "initial jurisdiction over any proceeding brought" for the alleged violations. However, this is not our case. Mounger did not "initially" seek injunctive relief for the alleged violations. He was the subject of an administrative investigation and hearing, during which Mounger claims the violations occurred, which led to administrative discipline; in fact, he admitted that the administrative hearing resulted in an official reprimand and there was a grievance procedure to follow. Mounger did not seek injunctive relief until after the official reprimand. Section 3309.5 may or may not authorize a police officer to bypass administrative procedures altogether and initially apply to the court for relief, but it is my view that once an officer elects to pursue his administrative remedies, he must see that process through to its conclusion before seeking judicial relief under section 3309.5. He may not, as Mounger attempts to do, cut short the administrative proceedings by filing an action pursuant to section 3309.5 before those proceedings have terminated.

Legislative enactments should not be construed to overthrow long-established principles of law unless such a intention is clearly made to appear either by express declaration or by necessary implication. (Tos v. Mayfair Packing Co. (1984) 160 Cal.App.3d 67, 77 [206 Cal.Rptr. 459].) "Unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed so as to avoid conflict with common law rules. [Citations.] A statute will be construed in light of common law decisions, unless its language "'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject matter. ..." [Citations.]' [Citation.] There is a presumption that a statute does not, by implication,

repeal the common law. [Citation.] Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws." (People v. Zikorus (1983) 150 Cal.App.3d 324, 330 [197 Cal.Rptr. 509].) The language of section 3309.5 does not expressly abrogate the doctrine of exhaustion of administrative remedies. The apparent conflict between the statute's grant of initial jurisdiction to the superior court on the one hand, and the common law requirement of exhaustion of administrative remedies on the other, may be reconciled by construing the statute to mean that a court has exclusive initial jurisdiction over disputes arising under Government Code section 3300 et seq. only when a police officer applies directly to the court for relief *1264 without first having initiated administrative proceedings for the resolution of such disputes.

The majority opinion concludes that, in any event, Mounger's failure to exhaust available administrative remedies does not bar the present action because his administrative remedy is inadequate in that "the administrative appeal Mounger elected to pursue was from the discipline imposed" whereas in this action he seeks redress for the "violation of his procedural rights during the interrogation." This is not a valid consideration in determining the applicability of the doctrine of exhaustion of administrative remedies. "Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review." (Yamaha Motor Corp. v. Superior Court (1986) 185 Cal.App.3d 1232, 1240 [230 Cal.Rptr. 382].)

Petitions for a rehearing were denied August 28, 1987, and the opinion was modified to read as printed above. Lillie, P. J., was of the opinion that the petition should be granted.

Cal.App.2.Dist.,1987.

Mounger v. Gates

END OF DOCUMENT

EXHIBIT M

APPENDIX E

State of California
COMMISSION ON STATE MANDATES
1414 K Street, Suite 315
Sacramento, CA 95814
(916) 323-3562
CSM 1 (12/89)

For Official Use Only

DEC 21 1995

TEST CLAIM FORM

Claim No. CSM-4499

Local Agency or School District Submitting Claim

City of Sacramento

Contact Person

Telephone No.

Dee Contreras

(916) 264-5424

Address Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

Representative Organization to be Notified

League of California Cities

This test claim alleges the existence of "costs mandated by the state" within the meaning of section 17514 of the Government Code, and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable. Chapter 465, Statutes of 1976; Chapters 775, 1173, 1174, 1175, Statutes of 1978; Chapter 405, Statutes of 1979; Chapter1367, Statutes of 1980; Chapter 944, Statutes of 1982; Chapter 964, Statutes of 1983; Chapter 1165, Statutes of 1989; Chapter 675, Statutes of 1990, adding and amending Sections 3300-3310 of the Government Code.

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Telephone No.

X Dee Contreras, Director of Labor Relations

(916) 264-5424

Signature of Authorized Representative

Date

x Dee Contreras

12/19/95

CITY OF SACRAMENTO
TEST CLAIM

Chapter 465, Statutes of 1976; Chapters 775, 1173,1174,1175, Statutes of 1978; Chapter 405, Statutes of 1979; Chapter 1367, Statutes of 1980; Chapter 944, Statutes of 1982; Chapter 964, Statutes of 1983; Chapter 1165, Statutes of 1989; Chapter 675, Statutes of 1990.

PEACE OFFICERS PROCEDURAL BILL OF RIGHTS

NARRATIVE

The city of Sacramento hereby submits this test claim to the Commission on State Mandates claiming reimbursement for the state mandated costs imposed on local agencies by the above referenced statutes.

Peace Officers Procedural Bill of Rights Act Is A Reimbursable State Mandate

Chapter 465, Statutes of 1976 added Chapter 9.7 (commencing with Section 3300) to Division 4 of Title I of the Government Code, thereby establishing the Public Safety Officers Procedural Bill of Rights Act. It prescribes various rights of public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription to the interrogation, and nature of any representation, and specifies other rights of such officers with regard to discrimination and discipline. Chapters 1174/78, 1175/78, 944/82, 964/83, 1165/89, and 675/90 all amended section 3301 of this act by further defining the term "public safety officer" for purposes of this chapter. Chapter 775/78 amended section 3303 by allowing an officer's representative to keep the officer's information confidential. Chapter 405/79 added section 3309.5, making it unlawful to violate this act, thereby relieving the officer of any requirement to exhaust administrative remedies before seeking "appropriate injunctive or other extraordinary relief" before superior court if violations are alleged.

Prior to the enactment of Chapter 465/76 any procedures for governing peace officer personnel investigations were developed and implemented at the option of the local agency. Together the above statutes constitute a reimbursable program by mandating uniform statewide procedures governing disciplinary procedures for local peace officers.

Increased Level Of Service Contained In G.C. Sections 3304(b) And 3303 (f).

Specifically new G.C. Section 3304(b) requires that any officers facing punitive action be provided with the option of an administrative hearing as follows:

"(b) No dismissal or demotion, nor denial of promotion, shall be undertaken by any

public agency without providing the public safety officer with an opportunity for administrative appeal."

Government Code section 3303 specifies that:

> "For the purposes of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

The Supreme Court in *White v. Co. of Sacramento*, 31 Cal.3d676, 183 Cal.Rptr. 520 (1982) held that the modifier, "for purposes of punishment," relates only to a "transfer", therefor a peace officer is entitled to an opportunity for administrative appeal for any reduction in salary resulting from an administrative decision including loss of skill pay, pay grade, rank, or probationary rank. (1)

Additionally new G.C. section 3303(f) requires that the officers have access to records of any interrogation and are entitled to any existing written documentation:

> "(f)The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation."

The administrative hearings and additional transcribed copies of interrogations have resulted in increased costs to local government. Neither of the above provisions apply to non-peace officer public employees, nor were they required prior to the passage of Chapter 465.

Legislature Recognized Statute Contains Reimbursable Mandate

Section 2. of Chapter 465, Statutes of 1976 states:

> "...there are state-mandated local costs in this act in the 1976-77 fiscal year and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code..."

Section 2231 of the R&T Code was the governing law at the time this statute was passed. It has since been repealed and replaced by sections 17514 and 17561 of the Government Code, among others, which require reimbursement under the same circumstances.

Annual Costs exceed $200 Per Year

The costs for the city of Sacramento resulting from this act are incurred in conducting the administrative reviews at the officers' option. The administrative review procedure may involve several letters and responses as well as the hearing itself which takes 4 to 12 hours of City employee relations and police department staff time. In addition, it takes an average of eight hours of clerical time for the City's Office of Internal Affairs to process each of the approximately 100 cases in a typical fiscal year. The professional and clerical staff costs to provide the mandated hearings, transcriptions and related services are estimated to have ranged between $20,000 and $25,000 in the 1994-1995 fiscal year.

No State Mandate Disclaimers Are Applicable

The following disclaimers available to the State to deny the existence of a State mandate are not an issue in this case.

1. No Crimes, Criminal Infractions or Penalties are Created, Eliminated, or Modified Chapter 465, Statutes of 1976 and its modifiers do not create a new crime or infraction and do not change the definition of a crime or infraction. While the addition of Sec. 3309.5 in 1979 makes violation of this act unlawful, it does not create a new responsibility for the city police and enforce this law in other jurisdictions which would cause the city to incur new costs.

2. The Law Does Not Affirm a Court Action
Chapter 465, Statutes of 1976 and its modifiers were not the result of a court mandate and no reference to costs mandated by the courts is made in these statutes. Although there have been numerous lawsuits regarding implementation and enforcement of the POBR act subsequent to the passage of Chapter 465, these cases are not relevant to the issue of the existence of a reimbursable mandate. One case, *Baggett v. Gates*,32 Cal.3d 128,185 Cal.Rptr.232 (1982) affirmed that the act applies to all peace officers including those employed by chartered cities.

3. A Federal Mandate is Not Implemented
Chapter 465, Statutes of 1976 and its modifiers were not the result of a Federal mandate and no reference to Federal standards or requirements or costs associated with meeting federal standards is made in these statutes.

4. A Voter Approved Mandate is Not Implemented
Chapter 465, Statutes of 1976 and its modifiers were not the result of a voter approved mandate or ballot measure and no reference to a voter approved mandate or requirements or costs associated with meeting a voter approved mandate is made in these statutes.

5. The Law Addresses a Unique Governmental Function

Chapter 465, Statutes of 1976 and its modifiers apply uniquely to governmental agencies in that they govern the rights of peace officers, a classification of employee unique to government agencies, in interrogations and disciplinary actions.

6. The Statute Was Not Requested by Local Government

Chapter 465, Statutes of 1976 was not requested by the City of Sacramento. It was, in fact, opposed by a number of cities and the League of California Cities. The City cannot, therefore, be represented as having voluntarily assumed the performance of this mandate.

7. No Fees are Authorized to Cover Costs of This Mandate

The State disclaimer to reimbursement of its mandates that local government has been given the authority to levy a charge, fee, or assessment is not available in the POBR act. There is no mention or reference to such authority in Chapter 465, Statutes of 1976 or its modifiers.

Conclusion

The City of Sacramento hereby does claim full and prompt payment from the State in implementing the State mandate contained in Chapter 465, Statutes of 1976 and its modifiers as identified for all of the reasons listed above.

Endnote(1). This construction was taken from *Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act*, April 1991 edition. Published by California Public Employee Relations Program, Institute of Industrial Relations, University of California, Berkeley.

CITY OF SACRAMENTO
TEST CLAIM

Chapter 465, Statutes of 1976
Peace Officers Procedural Rights

DECLARATION

I, Dee Contreras, Director of Labor Relations, Office of Labor Relations, City of Sacramento, am responsible for recovering City costs incurred in complying with the Peace Officers Bill of Rights Act.

For approximately the last 5 years, I have been responsible for insuring that the City is in compliance with Chapter 465, Statutes of 1976 and subsequent modifying legislation.

Chapter 465, Statutes of 1976 added Chapter 9.7 to Division 4 of Title I of the Government Code, requiring, in part, that:

> "No dismissal or demotion, nor denial of promotion, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[Sec. 3304(b)]
>
> and
>
> "The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation." [Sec. 3303(f)].

In complying with the above requirements of Chapter 465, Statutes of 1976, during the 1994-95 fiscal year, the city of Sacramento incurred costs in excess of $20,000.

I believe that the costs incurred in complying with the above referenced provisions of the Government Code as added by Chapter 465, Statutes of 1976 should be reimbursed to the City of Sacramento by the State of California as these costs clearly fall within the definition of "costs mandated by the State" found in Government Code Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service

of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I certify under penalty of perjury that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

12/20/95 Sacramento, CA — D Cortez

Date and Place — Signature

APPENDIX E

State of California
COMMISSION ON STATE MANDATES
1414 K Street, Suite 315
Sacramento, CA 95814
(916) 323-3562
CSM 1 (12/89)

For Official Use Only
Claim No.

TEST CLAIM FORM

Local Agency or School District Submitting Claim

City of Sacramento

Contact Person — Telephone No.

Dee Contreras — (916) 264-5424

Address: Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

Representative Organization to be Notified

League of California Cities

This test claim alleges the existence of "costs mandated by the state" within the meaning of section 17514 of the Government Code, and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable. Chapter 465, Statutes of 1976; Chapters 775, 1173, 1174, 1175, Statutes of 1978; Chapter 405, Statutes of 1979; Chapter1367, Statutes of 1980; Chapter 944, Statutes of 1982; Chapter 964, Statutes of 1983; Chapter 1165, Statutes of 1989; Chapter 675, Statutes of 1990, adding and amending Sections 3300-3310 of the Government Code.

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative — Telephone No.

X Dee Contreras, Director of Labor Relations — (916) 2645424

Signature of Authorized Representative — Date

X Dee Contreras — 12/19/95

CITY OF SACRAMENTO
TEST CLAIM

Chapter 465, Statutes of 1976; Chapters 775, 1173,1174,1175, Statutes of 1978; Chapter 405, Statutes of 1979; Chapter 1367, Statutes of 1980; Chapter 944, Statutes of 1982; Chapter 964, Statutes of 1983; Chapter 1165, Statutes of 1989; Chapter 675, Statutes of 1990.

PEACE OFFICERS PROCEDURAL BILL OF RIGHTS

NARRATIVE

The city of Sacramento hereby submits this test claim to the Commission on State Mandates claiming reimbursement for the state mandated costs imposed on local agencies by the above referenced statutes.

Peace Officers Procedural Bill of Rights Act Is A Reimbursable State Mandate.

Chapter 465, Statutes of 1976 added Chapter 9.7 (commencing with Section 3300) to Division 4 of Title I of the Government Code, thereby establishing the Public Safety Officers Procedural Bill of Rights Act. It prescribes various rights of public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription to the interrogation, and nature of any representation, and specifies other rights of such officers with regard to discrimination and discipline. Chapters 1174/78, 1175/78, 944/82, 964/83, 1165/89, and 675/90 all amended section 3301 of this act by further defining the term "public safety officer" for purposes of this chapter. Chapter 775/78 amended section 3303 by allowing an officer's representative to keep the officer's information confidential. Chapter 405/79 added section 3309.5, making it unlawful to violate this act, thereby relieving the officer of any requirement to exhaust administrative remedies before seeking "appropriate injunctive or other extraordinary relief" before superior court if violations are alleged.

Prior to the enactment of Chapter 465/76 any procedures for governing peace officer personnel investigations were developed and implemented at the option of the local agency. Together the above statutes constitute a reimbursable program by mandating uniform statewide procedures governing disciplinary procedures for local peace officers.

Increased Level Of Service Contained In G.C. Sections 3304(b) And 3303 (f).

Specifically new G.C. Section 3304(b) requires that any officers facing punitive action be provided with the option of an administrative hearing as follows:

"(b) No dismissal or demotion, nor denial of promotion, shall be undertaken by any

public agency without providing the public safety officer with an opportunity for administrative appeal."

Government Code section 3303 specifies that:

> "For the purposes of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

The Supreme Court in *White v. Co. of Sacramento*, 31 Cal.3d676, 183 Cal.Rptr. 520 (1982) held that the modifier, "for purposes of punishment," relates only to a "transfer", therefor a peace officer is entitled to an opportunity for administrative appeal for any reduction in salary resulting from an administrative decision including loss of skill pay, pay grade, rank, or probationary rank. (1)

Additionally new G.C. section 3303(f) requires that the officers have access to records of any interrogation and are entitled to any existing written documentation:

> "(f)The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation."

The administrative hearings and additional transcribed copies of interrogations have resulted in increased costs to local government. Neither of the above provisions apply to non-peace officer public employees, nor were they required prior to the passage of Chapter 465.

Legislature Recognized Statute Contains Reimbursable Mandate

Section 2. of Chapter 465, Statutes of 1976 states:

> "...there are state-mandated local costs in this act in the 1976-77 fiscal year and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code..."

Section 2231 of the R&T Code was the governing law at the time this statute was passed. It has since been repealed and replaced by sections 17514 and 17561 of the Government Code, among others, which require reimbursement under the same circumstances.

Annual Costs exceed $200 Per Year

The costs for the city of Sacramento resulting from this act are incurred in conducting the administrative reviews at the officers' option. The administrative review procedure may involve several letters and responses as well as the hearing itself which takes 4 to 12 hours of City employee relations and police department staff time. In addition, it takes an average of eight hours of clerical time for the City's Office of Internal Affairs to process each of the approximately 100 cases in a typical fiscal year. The professional and clerical staff costs to provide the mandated hearings, transcriptions and related services are estimated to have ranged between $20,000 and $25,000 in the 1994-1995 fiscal year.

No State Mandate Disclaimers Are Applicable

The following disclaimers available to the State to deny the existence of a State mandate are not an issue in this case.

1. No Crimes, Criminal Infractions or Penalties are Created, Eliminated, or Modified Chapter 465, Statutes of 1976 and its modifiers do not create a new crime or infraction and do not change the definition of a crime or infraction. While the addition of Sec. 3309.5 in 1979 makes violation of this act unlawful, it does not create a new responsibility for the city police and enforce this law in other jurisdictions which would cause the city to incur new costs.

2. The Law Does Not Affirm a Court Action
Chapter 465, Statutes of 1976 and its modifiers were not the result of a court mandate and no reference to costs mandated by the courts is made in these statutes. Although there have been numerous lawsuits regarding implementation and enforcement of the POBR act subsequent to the passage of Chapter 465, these cases are not relevant to the issue of the existence of a reimbursable mandate. One case, *Baggett v. Gates*,32 Cal.3d 128,185 Cal.Rptr.232 (1982) affirmed that the act applies to all peace officers including those employed by chartered cities.

3. A Federal Mandate is Not Implemented
Chapter 465, Statutes of 1976 and its modifiers were not the result of a Federal mandate and no reference to Federal standards or requirements or costs associated with meeting federal standards is made in these statutes.

4. A Voter Approved Mandate is Not Implemented
Chapter 465, Statutes of 1976 and its modifiers were not the result of a voter approved mandate or ballot measure and no reference to a voter approved mandate or requirements or costs associated with meeting a voter approved mandate is made in these statutes.

5. The Law Addresses a Unique Governmental Function

Chapter 465, Statutes of 1976 and its modifiers apply uniquely to governmental agencies in that they govern the rights of peace officers, a classification of employee unique to government agencies, in interrogations and disciplinary actions.

6. The Statute Was Not Requested by Local Government

Chapter 465, Statutes of 1976 was not requested by the City of Sacramento. It was, in fact, opposed by a number of cities and the League of California Cities. The City cannot, therefore, be represented as having voluntarily assumed the performance of this mandate.

7. No Fees are Authorized to Cover Costs of This Mandate

The State disclaimer to reimbursement of its mandates that local government has been given the authority to levy a charge, fee, or assessment is not available in the POBR act. There is no mention or reference to such authority in Chapter 465, Statutes of 1976 or its modifiers.

Conclusion

The City of Sacramento hereby does claim full and prompt payment from the State in implementing the State mandate contained in Chapter 465, Statutes of 1976 and its modifiers as identified for all of the reasons listed above.

Endnote(1). This construction was taken from *Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act*, April 1991 edition. Published by California Public Employee Relations Program, Institute of Industrial Relations, University of California, Berkeley.

CITY OF SACRAMENTO
TEST CLAIM

Chapter 465, Statutes of 1976
Peace Officers Procedural Rights

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For approximately the last 5 years, I have been responsible for insuring that the City is in compliance with Chapter 465, Statutes of 1976 and subsequent modifying legislation.

Chapter 465, Statutes of 1976 added Chapter 9.7 to Division 4 of Title I of the Government Code, requiring, in part, that:

> "No dismissal or demotion, nor denial of promotion, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[Sec. 3304(b)]
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> "The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation." [Sec. 3303(f)].

In complying with the above requirements of Chapter 465, Statutes of 1976, during the 1994-95 fiscal year, the city of Sacramento incurred costs in excess of $20,000.

I believe that the costs incurred in complying with the above referenced provisions of the Government Code as added by Chapter 465, Statutes of 1976 should be reimbursed to the City of Sacramento by the State of California as these costs clearly fall within the definition of "costs mandated by the State" found in Government Code Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service

of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I certify under penalty of perjury that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

12/20/95 Sacramento, CA [signature]

Date and Place Signature

PUBLIC SAFETY OFFICERS—PROCEDURAL RIGHTS

CHAPTER 465

ASSEMBLY BILL NO. 301

An act to add Chapter 9.7 (commencing with Section 3300) to Division 4 of Title 1 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

This bill would establish the Public Safety Officers Procedural Bill of Rights Act to provide state statutes with respect to matters that are now regulated by local ordinances and regulations. It would define "public safety officers" to include all peace officers and firemen including employees of a charter city or county, prescribe various rights of public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription of the interrogation, and representation and specify other rights of such public safety officers with regard to discrimination and discipline.

The bill would also provide that neither appropriation is made nor obligation created for the reimbursement of any local entity for any costs incurred by it pursuant to the bill for a specified reason.

The bill would become operative on July 1, 1970.

The people of the State of California do enact as follows:

SECTION 1. Chapter 9.7 (commencing with Section 3300) is added to Division 4 of Title 1 of the Government Code, to read:

CHAPTER 9.7 PUBLIC SAFETY OFFICERS

3300.

This chapter is known and may be cited as the Public Safety Officers Procedural Bill of Rights Act.

3301.

For purposes of this chapter, the term public safety officer includes all peace officers and firemen, including peace officers or firemen who are employees of a charter city or county. The Legislature hereby finds and declares that the rights and protections provided to peace officers or firemen under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement and fire protection depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety employees wherever situated within the State of California.

3302.

Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

3303.

When for any reason any public safety officer is under investigation or subjected to interrogation by his commanding officer, or any other member of a police department, which could lead to disciplinary action, demotion, dismissal, transfer

Changes or additions in text are indicated by underline

or administrative charges, such investigation or interrogation shall be conducted under the following conditions:

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the investigation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his own personal bodily necessities when necessary.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with transfer or disciplinary action, or loss of his job. No promise of reward shall be made as an inducement to answering any question. The public safety officer under interrogation shall not be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

(f) The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

(g) If the public safety officer under interrogation is likely to be placed under arrest as a result of the interrogation, he shall be completely informed of all his rights prior to the commencement of the interrogation.

(h) At the request of any public safety officer under interrogation, he shall have the right to be represented by any representative of his choice who shall be present at all times during such interrogation whenever such interrogation may result in disciplinary action or criminal charges against the public safety officer.

No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment.

This section shall not apply to any investigation or interrogation of a public safety officer in the course of counseling, instruction, or informal verbal admonishment by, or other routine contact with, a supervisor.

3304.

(a) No public safety officer shall be discharged, disciplined, demoted, transferred or denied promotion or reassignment or otherwise discriminated against in regard to his employment, or be threatened with any such treatment, by reason of his lawful exercise of his constitutional rights, the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

deletions by asterisks * * *

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him with insubordination.

(b) No dismissal or demotion, nor denial of promotion, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

3305.

No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any record kept at his place or unit of employment or any other place recording such comments by any person, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware that such comment is being placed in his personnel file or other place of recordation of such comments, except that such entry may be made if after reading such instrument containing any adverse comment the public safety officer refuses to sign it. A witness shall thereafter note that such officer was presented with the opportunity to read and sign such instrument and refused to do so.

3306.

A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment.

3307.

No public safety officer shall be compelled to submit to a polygraph examination against his will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take a polygraph examination.

3308.

No public safety officer shall be required or requested for purposes of job assignment or other personnel action to disclose any item of his property, income, assets, source of income, debts or personal or domestic expenditures (including those of any member of his family or household) unless such information is obtained under proper legal procedure, tends to indicate a conflict of interest with respect to the performance of his official duties, or is necessary for the employing agency to ascertain the desirability of assigning the public safety officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered.

3309.

No public safety officer shall have his locker, or other space for storage that may be assigned to him searched except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that is owned by the employing agency. Any person from whom consent is requested shall be told that he has the right to deny the consent.

3310.

Any public agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to peace officers or firemen the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure.

SEC. 2. There are no local costs in this act that require reimbursement under Section 2231 of the Revenue and Taxation Code because there are no duties, obligations or responsibilities imposed on local entities in the 1975-76 fiscal year by this act. However there are state-mandated local costs in this act in the 1976-77 fiscal

year and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code which can be handled in the regular budget process.

SEC. 3. This act shall become operative on July 1, 1976.

Approved and filed Aug. 18, 1976.

WORKERS' COMPENSATION—PUBLIC EMPLOYEES

CHAPTER 466

SENATE BILL NO. 639

An act to amend Sections 3212, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, and 3213 of, and to add Section 4850 to, the Labor Code, relating to workers' compensation.

LEGISLATIVE COUNSEL'S DIGEST

The existing law provides that certain specified "injuries" suffered by specified public employees are presumed to arise out of and in the course of the employment.

This bill would provide that the presumption that the injury arises out of and in the course of employment shall be extended to such employees following termination of service for a period of three calendar months for each full year of service, commencing with the last date actually worked, but not to exceed 60 months.

The bill would also specify that the average weekly earnings for such employees shall be taken at the maximum.

This bill would also provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant to the bill.

The people of the State of California do enact as follows:

SECTION 1. Section 3212 of the Labor Code is amended to read:

3212.

In the case of members of a sheriff's office, district attorney's staff of inspectors and investigators or of police or fire departments of cities, counties, cities and counties, districts or other public or municipal corporations or political subdivisions, whether such members are volunteer, partly paid, or fully paid, and in the case of active firefighting members of the Division of Forestry of the State Department of Natural Resources whose duties require firefighting or of any county forestry or firefighting department or unit, whether voluntary, fully paid, or partly paid, and in the case of members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators, and other officeworkers, the term "injury" as used in this act includes hernia when any part of the hernia develops or manifests itself during a period while such member is in the service in such office, staff, division, department or unit, and in the case of members of such fire departments, except those whose principal duties are clerical, such as stenographers, telephone operators and other officeworkers, and in the case of county forestry or firefighting departments, except those whose principal duties are clerical, such as stenographers,

No. 619 are both chaptered and become effective January 1, 1978, both amend Section 51202, and this bill is chaptered after Assembly Bill No. 619, in which case Section 15 of this act shall not become operative.

SEC. 3. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be an appropriation made by this act because the duties, obligations, or responsibilities imposed on local governmental entities or school districts by this act are such that related costs are incurred as part of their normal operating procedures.

ITEM VETO

SEC. 4. The sum of one hundred fifty thousand dollars ($150,000) is appropriated from the General Fund to the Department of Education to conduct workshops and in-service training clinics for teachers and administrators in the methods and materials for venereal disease education, and the development and distribution of teaching material for use by teachers and pupils in such courses.

ITEM VETO

"In reducing Section 4 the Governor stated:

"I am reducing the appropriation contained in Section 4 of Assembly Bill No. 1209 from $150,000 to $70,000.

"The reduced appropriation will be sufficient to fund this program through June 30, 1978. Future funding can more appropriately be addressed through the normal budget process.

"With this deletion, I approve Assembly Bill No. 1209."

Approved Sept. 2, 1977.

Filed Sept. 3, 1977.

CALIFORNIA CODES—MAINTENANCE AND RESTATEMENT

CHAPTER 579

SENATE BILL NO. 833

An act to amend Sections 1202, 1207, 1208, 1210, 1212, 1220, 1221, 1222, 1224, 1242, 1260, 1261, 1261.5, 1262, 1263, 1264, 1265, 1269, 1270, 1300, 1320, 1321, 4905, 5209, 9889.61, 19414.5, 19491.5, and 23428.25 of, to repeal Section 2727.3 of, and to repeal Article 9 (commencing with Section 1820) of Chapter 4 of Division 2 of, the Business and Professions Code, to amend Sections 1786.26, 2954.9, 2905.71, and 3052 of the Civil Code, to amend Sections 690.50, 1501, and 1824 of the Code of Civil Procedure, to amend Section 25100 of, and to repeal Sections 15006.1 and 15501.1 of, the Corporations Code, to amend Sections 1330, 68130, 89067, 90400, 90404, 90405, and 90406 of, and to amend the heading of Article 1 (commencing with Section 90400) of Chapter 10 of Part 55 of Division 8 of, the Education Code, to amend Sections 6329 and 9700 of the Elections Code, to amend Section 18292 of the Financial Code, to amend Sections 33732, 38703, and 56316, to amend and renumber the heading of Chapter 11 (commencing with Section 6101) of Part 1 of Division 4 of, to amend and renumber the heading of Chapter 4 (commencing with Section 63001) of Part 3 of Division 21 of, and to repeal Chapter 10 (commencing with Section 6051) of Part 1 of Division 4 of, the Food and Agricultural Code, to amend Sections 3311, 6103.1, 6254, 6546.1, 9766, 11093, 11554, 14379, 16475, 18974, 29707.1, 53090, 53950, 69894.4, and 74924 of, to amend and renumber Sections 7801 and 20072.2, as added by Chapter 1115 of the Statutes of 1976, of, to amend and renumber the heading of Chapter 19 (commencing with Section 7500) of Division 7 of Title 1, as added by Chapter 1478 of the Statutes of 1974, of, to amend and renumber the heading of Chapter 20 (commencing with Section 7525) of Division 7 of Title 1, as added by Chapter 1079 of the Statutes of 1976, of, to add Chapter 3.1 (commencing with Section 8220) to Division 1 of Title 2 of, to repeal Sections 15275, as added by Chapter 170

Changes or additions in text are indicated by underline

of the Statutes of 1953, 31550.0, and 65906.5 of, and to repeal Part 6 (commencing with Section 17300) of Division 4 of Title 2 of, the Government Code, to amend Section 6309.6 of, and to repeal Section 6066 of, the Harbors and Navigation Code, to amend Sections 405, 1250.1, 1357, 3751, 13131.3, 13984, 14896, 18906, 26013, 26025, 26522, 26531, 26575, 27000, 27002, 27030, 28361, 28801, 28802, 28810, 32108, 33328.4, 34142 and 38500 of, to amend the heading immediately preceding Section 37603 of, to amend and renumber Sections 306, 306.5, 306.7, 307, 307.3, 308, 308.4, 308.5, 308.6, 308.8, 308.9, 25490.5, 33675, as added by Chapter 1162 of the Statutes of 1976, and 33675, as added by Chapter 1338 of the Statutes of 1976, of, to add Section 10000 to, and to repeal Sections 320, 320.5, 321, 321.2, 321.7, 322.5, 323.2, 323.5, 323.7, 10000, as amended by Chapter 1893 of the Statutes of 1965, and 13143.1 of, the Health and Safety Code, to amend Sections 1063.1, 1280.7, 1750, 1751, 4090, 10123, 11560.2, 11759 of, and to amend and renumber Sections 10123.1, as added by Chapter 1225 of the Statutes of 1975, 10124, as added by Chapter 522 of the Statutes of 1972, and 10127.1 (formerly Section 10127 of, amended and renumbered by Chapter 1079 of the Statutes of 1976) of, the Insurance Code, to amend Sections 1136.2 and 6144 of, and to add Section 3729 to, the Labor Code, to amend Sections 800 and 1269b of the Penal Code, to amend Section 1240 of the Probate Code, to amend Sections 3358, 3412, 3419, 3426, 3429, 3744, 3770, 3775, 4551.5, 6091, and 25507 of, and to repeal Section 3270 of, the Public Resources Code, to amend Sections 100252, 103352, and 130053.5 of, to amend and renumber Sections 2781, 2782, and 2783, as added by Chapter 451 of the Statutes of 1976, of, to amend and renumber the heading of Chapter 5 (commencing with Section 2781) of Part 2 of Division 1, as added by Chapter 1202 of the Statutes of 1975, of, and to amend and renumber the heading of Chapter 4.5 (commencing with Section 2001) of Part 2 of Division 1, as added by Chapter 915 of the Statutes of 1976, of, the Public Utilities Code, to amend Sections 434.5, 2191.3, 17001, 40024, and 40031 of, and to repeal Section 9157 of, the Revenue and Taxation Code, to amend the heading of Article 3 (commencing with Section 90) of Chapter 1 of Division 1 of the Streets and Highways Code, to amend Sections 9250.7, 11514, 11713, 11902, 12509, 12650, 13201.5, 21051, 23102, 27150, and 41603 of the Vehicle Code, to amend Sections 13142.5 and 71070 of, to amend and renumber Section 31014, as added by Chapter 1052 of the Statutes of 1976, of, and to repeal Sections 71673 and 71681 of, the Water Code, to amend Sections 628, 701, 701.1, 701.2, 701.3, 701.4, 701.5, 701.7, 702, 727, 7375, 9303, 9312, 11008.9, 11063 and 11470.5 of, to amend the heading of Chapter 2.3 (commencing with Section 16140) of Part 4 of Division 9 of, to amend and renumber Sections 6325.1, as added by Chapter 1274 of the Statutes of 1975, 10053.7, as added by Chapter 405 of the Statutes of 1973, 10544.3, 10602.5, as added by Chapter 171 of the Statutes of 1975, 14019.3, as added by Chapter 672 of the Statutes of 1976, 15053.5, as added by Chapter 1619 of the Statutes of 1970, 18951, 18952, and 18953, as added by Chapter 504 of the Statutes of 1976, of, to amend and renumber the heading of Article 13.1 (commencing with Section 840) of Chapter 2 of Part 1 of Division 2 of, to amend and renumber the heading of Chapter 8 (commencing with Section 14500) of Part 3 of Division 9 of, and to repeal Sections 4026 and 14150.9 of, the Welfare and Institutions Code, and to repeal Chapter 1378 of the Statutes of 1965, to repeal Section 22 of Chapter 1936 of the Statutes of 1976, and to amend Section 9 of Chapter 12 of the Statutes of 1976, relating to maintenance of the codes.

LEGISLATIVE COUNSEL'S DIGEST

Existing law directs the Legislative Counsel to advise the Legislature from time to time as to legislation necessary to maintain the codes and legislation necessary to codify such statutes as are enacted from time to time subsequent to the enactment of the codes.

This bill would restate existing provisions of law to effectuate the recommendations made by the Legislative Counsel to the Legislature for consideration during 1977, and would not make any substantive change in the law.

deletions by asterisks * * *

(g) Every statement which is filed shall be accompanied by the fees required by Chapter 4 (commencing with Section 9101) of Division 9 of the Commercial Code in the case of a financing statement not on the standard form and shall remain effective for a period of five years from the date of filing.

SEC. 57. The heading of Chapter 4 (commencing with Section 63001) of Part 3 of Division 21 of the Food and Agricultural Code is amended and renumbered to read:

CHAPTER * * * 5. MARKETING OF AVOCADOS

SEC. 58. Section 3311 of the Government Code is amended to read:

3311.

Nothing in this chapter shall in any way be construed to limit the use of any public safety agency or any public safety officer in the fulfilling of mutual aid agreements with other jurisdictions or agencies, nor shall this chapter be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where such activity is * * * deemed necessary or desirable by the jurisdictions or the agencies involved.

SEC. 59. Section 6103.1 of the Government Code is amended to read:

6103.1.

Section 6103 does not apply to * * * any fee or charge for official services required by Parts 2 (commencing with Section 1200) 3 (commencing with Section 2000) and 4 (commencing with Section 4000) of Division 2 of the Water Code. * * *

SEC. 60. Section 6254 of the Government Code is amended to read:

6254.

Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled;

(c) Personnel, medical, or similar files, the disclosure of which would constitute and unwarranted invasion of personal privacy;

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies;

(2) Examinations, operating, or condition reports prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1);

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1); or

(4) Information received in confidence by any state agency referred to in subdivision (1).

(e) Geological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person;

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General

and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes, except that local police agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the persons involved in an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage as the result of the incident caused by arson, burglary, fire, explosion, robbery, vandalism, or a crime of violence as defined by subdivision (b) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation * * * or disclosure would endanger the successful completion of the investigation or a related investigation;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination;

(h) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision;

(i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information;

(j) Library and museum materials made or acquired and presented solely for reference or exhibition purposes;

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege;

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter;

(m) In the custody or maintained by the Legislative Counsel;

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for; and

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

SEC. 61. Section 6546.1 of the Government Code is amended to read:

6546.1.

In the County of Los Angeles, any agency, commission, or board created for by joint powers agreement entered into by cities pursuant to Article 1 (commencing with Section 6500) of this chapter for the purpose of the acquisition, operation, repair, maintenance and administration of the Hollywood-Burbank Airport as a public airport, pursuant to the Federal Aviation Act of 1958, as amended, may carry out such purpose and may authorize the issuance of revenue bonds, pursuant to this article, to pay for acquiring, repairing, and financing such project including all facilities and improvements and all expenses incidental thereto or connected therewith. Property tax revenues accruing to, levied by, or collected by any local agency which is a party to such a joint powers agreement shall not be used to redeem such revenue bonds unless an ordinance authorizing the use of such property tax revenues

reimbursement for, services provided pursuant to subdivisions (a), (b), (g), and (h) of Section 16983 and Sections 16010 and 16030.5 of the Education Code.

SEC. 221. The heading of Chapter 2.3 (commencing with Section 16140) of Part 4 of Division 9 of the Welfare and Institutions Code is amended to read:

CHAPTER 2.3. * * * INTERCOUNTRY ADOPTIONS * * *

SEC. 222. Section 18951 of the Welfare and Institutions Code, as added by Chapter 501 of the Statutes of 1970, is amended and renumbered to read:

* * * 10950.1.

This chapter * * * shall be known as the California Child Abuse Prevention Act of 1974.

SEC. 223. Section 18952 of the Welfare and Institutions Code, as added by Chapter 501 of the Statutes of 1970, is amended and renumbered to read:

* * * 10950.2.

The provisions of this chapter * * * shall be operative only for and during such times as federal funds are provided or made available for the purposes of such provisions.

SEC. 224. Section 18953 of the Welfare and Institutions Code, as added by Chapter 501 of the Statutes of 1970, is amended and renumbered to read:

* * * 10950.3.

The provisions of this chapter * * * shall remain in effect only until December 31, 1979, and as of such date is repealed, unless a later enacted statute which is chaptered before December 31, 1979, deletes or extends such date.

SEC. 225. Chapter 1378 of the Statutes of 1965 is repealed.

SEC. 226. Section 22 of Chapter 1036 of the Statutes of 1970 is repealed.

SEC. 227. Section 9 of Chapter 1208 of the Statutes of 1976 is amended to read:

SEC. 9. The sum of seven hundred ninety-six thousand dollars ($796,000) is hereby appropriated from the General Fund to the State Department of Health, in augmentation of subitem (j) of Item 293 of the Budget Act of 1976 (Ch. 320, Stats. 1976), to be expended for the purposes specified in Chapter 1208 of the Statutes of 1976 and to provide additional resources for the Child Health Disability Prevention Program (Art. 3.4 (commencing with Sec. 320) Ch. 2, Pt. 1, Div. 1, H. & S. C.).

SEC. 228. Any section of any act enacted by the Legislature during the 1977 portion of the 1977-78 Regular Session, which takes effect on or before January 1, 1979, and which amends, amends and renumbers, or repeals a section amended, amended and renumbered, or repealed by this act, shall prevail over this act, whether such act is enacted prior or subsequent to this act.

Approved Sept. 2, 1977.

Filed Sept. 3, 1977.

JURY—COUNTIES OF THIRD CLASS—FEES AND PAYMENT OF EXPENSES

CHAPTER 580

ASSEMBLY BILL NO. 970

An act to amend Section 76003 of the Government Code, relating to jurors.

LEGISLATIVE COUNSEL'S DIGEST

Under existing law, trial jurors in San Diego County receive $6 for each day's attendance and $0.15 for each mile necessarily traveled one way in attending court as a juror.

This bill would authorize the board of supervisors to establish the daily rate to be paid trial jurors and the amount to be allowed for reimbursement of expenses, including transportation necessarily incurred in attending court, but would provide that such daily rate shall not be less than $5 per day and that the amount allowed for expenses shall not be less than an amount equal to $0.15 per mile one way.

The bill would also provide that no appropriation or reimbursement shall be made because the act is in accordance with the request of a local government entity or entities which desired authority to act pursuant to the act.

The people of the State of California do enact as follows:

SECTION 1. Section 76003 of the Government Code is amended to read:

76003.

In a county of the third class the fees of the grand jurors shall be not less than ten dollars ($10) and not more than twenty-five dollars ($25), as determined by the county board of supervisors, for each day's attendance and mileage at the rate of ten cents ($0.10) a mile necessarily traveled in attending court, in going and returning, unless otherwise determined at a higher amount by the county board of supervisors.

The board of supervisors shall establish the fees of trial jurors in the superior and municipal courts * * * and the amount to be allowed for reimbursement of expenses including transportation necessarily incurred in attending court; provided, that such fee shall not be less than five dollars ($5) for each day's attendance and that the amount allowed for reimbursement of expenses shall not be less than an amount equal to fifteen cents ($0.15) a mile * * *, one way. In criminal cases fees and * * * reimbursement for expenses of trial jurors in the superior and municipal * * * courts shall be paid by the treasurer of the county out of the general fund of the county upon warrants drawn by the county auditor upon the written order of the judge of the court in which the juror was in attendance, and the treasurer of the county shall pay the warrants.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be any appropriation made by this act because this act is in accordance with the request of a local government entity or entities which desired legislative authority to act to carry out the program specified in this act.

Approved Sept. 3, 1977.

Filed Sept. 3, 1977.

West's CALIFORNIA LEGISLATIVE SERVICE

STATUTE AND CODE AMENDMENTS
1977–1978 REGULAR SESSION
(STATUTES OF 1978)

PUBLIC SAFETY OFFICERS—CONFIDENTIAL INFORMATION

CHAPTER 775

ASSEMBLY BILL NO. 2010

An act to amend Section 3303 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law provides that a public safety officer, which includes specified peace officers, under investigation has specified rights relating to the investigation and interrogation, including the right to a representative of his choice. Existing law makes no specific provision for the confidentiality of information received by such a representative from a public safety officer under investigation for noncriminal matters.

The bill would provide that such a representative shall not be required to disclose, nor be subject to punitive action for refusing to disclose, any information received from the officer under investigation.

Additions in text are indicated by underline; deletions by asterisks * * *

The people of the State of California do enact as follows:

SECTION 1. Section 3303 of the Government Code is amended to read:

3303.

When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

(f) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

(g) If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights.

(h) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result in punitive action against any public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(i) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

Approved Sept. 15, 1978.

Filed Sept. 18, 1978.

Changes or additions in text are indicated by underline

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STATE EMPLOYMENT RELATIONS

CHAPTER 776

ASSEMBLY BILL NO. 3053

An act to amend Sections 3513, 3515, 3515.6, 3516.5, 3517.6, 3520.5, 3521, 3523, 3526, 3541, 13920, 13924, 14076, 18001, 18005, 18005.5, 18006, 18007, 18020, 18021, 18021.5, 18021.6, 18021.7, 18022, 18023, 18024, 18025, 18025.1, 18026, 18050, 18051, 18051.5, 18100, 18100.5, 18101, 18101.5, 18102, 18102.5, 18103, 18105, 18120, 18121, 18122, 18122.1, 18123, 18124, 18125, 18126, 18127, 18128, 18129, 18135, 18135.5, 18136, 18137, 18137.5, 18130, 18139, 18140, 18141, 18142, 18300, 18301, 18302, 18310, 18705, 18714, 18730, 18731, 18732, 18950, 18950.1, 18951, 18952, 18953, 18953.5, 18954, 18955, 18956, 18957, 18959, 18960, 18961, 19080.5, 19100, 19120, 19251, 19252, 19261, 19300, 19301, 19302, 19303, 19304, 19330, 19330.5, 19331, 19332, 19333, 19334, 19335, 19360, 19360.5, 19361, 19362, 19450, 19451, 19452, 19455, 19460, 19461, 19462, 19463, 19464, 19465, 19502, 19503, 19532, 19533, 19535, 19536, 19536.5, 19537, 19538, 19540, 19541, 19555, 19556, 20750.11, 21400, 21402, 21404, 21405, 22754, 22790, 22813, 22814, 22815, 22816, 22825, and 22825.1 of, and to add Sections 19100.5 and 19120.5 to, the Government Code, relating to state employment relations.

LEGISLATIVE COUNSEL'S DIGEST

Existing provisions of the State Employer-Employee Relations Act (SEERA) provide that in any case where specified provisions of the law relating to state civil service are in conflict with the provisions of a memorandum of understanding entered into pursuant to the act, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

This bill would delete from those provisions specified to be superseded by the memorandum of understanding provisions relating to state officers and employees authorizing deductions from their salaries and wages for the payment of specified items, and provisions of the State Civil Service Act relating to limited-term employees, layoffs and demotions, the authority of ap-

PUBLIC SAFETY OFFICERS—SCHOOL BOARD MEMBERSHIP

CHAPTER 1173

ASSEMBLY BILL NO. 2443

An act to amend Section 3302 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law provides that except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging in political activity.

This bill would, in addition, provide that no public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district.

The people of the State of California do enact as follows:

SECTION 1. Section 3302 of the Government Code is amended to read:

3302.

(a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

(b) No public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district.

Approved and filed Sept. 20, 1978.

PUBLIC SAFETY OFFICERS—CORRECTIONAL OFFICERS

CHAPTER 1174

ASSEMBLY BILL NO. 2000

An act to amend Section 3301 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law provides various rights for public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription of the rights of such public safety officers with regard to discrimination and discipline. Public safety officer is defined to include specified sheriffs, policemen, marshals, and constables, and specified members of the California Highway Patrol and the California State Police Division.

This bill would include as public safety officers for such purposes, correctional officers employed by the State Department of Corrections.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301.

For purposes of this chapter, the term public safety officer means all peace officers, as defined in Section 830.1 and subdivisions (a) and (b) of Section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county. The term public safety officer also includes state correctional officers employed by the State Department of Corrections. The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

Approved and filed Sept. 20, 1978.

PUBLIC SAFETY OFFICERS—PEACE OFFICERS

CHAPTER 1175

SENATE BILL NO. 1513

An act to amend Section 3301 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law provides various rights for public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription of the interrogation, and representation, and specifies other rights of such public safety officers with regard to discrimination and discipline. Public safety officer is defined to include specified sheriffs, policemen, marshals, and constables, including peace officers who are employees of a charter city or county and specified members of the California Highway Patrol and the California State Police Division.

This bill would, in addition, include as public safety officers for such purposes all persons employed by the State of California and designated by law as peace officers.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301.

For purposes of this chapter, the term public safety officer means all peace officers, as defined in Section 830.1 and subdivisions (a) and (b) of Section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county. The term public safety officer also means all persons employed by the State of California and designated by law as peace officers.

deletions by asterisks * * *

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

Approved and filed Sept. 20, 1978.

RETIREMENT—STATE TEACHERS

CHAPTER 1176

ASSEMBLY BILL NO. 3070

An act to amend Sections 23902, 23904.5, 23905, 23910, and 23910.6 of the Education Code, relating to the State Teachers' Retirement System.

LEGISLATIVE COUNSEL'S DIGEST

(1) Existing State Teachers' Retirement Law authorizes a member to apply for a disability allowance if the member has 5 years or more of credited service and meets specified conditions.

This bill would add a requirement that at least 4 years of credited service be for actual service performed for the member's employer in order to apply for a disability allowance, except a disability allowance due because of an on-the-job injury or disease.

(2) Existing law requires that a member with a disabling impairment amenable to treatment be deemed to be under disability if undergoing prescribed treatment.

This bill would require that a person be deemed to be under disability if additional training or a rehabilitation program may allow the member to perform in a comparable position or return to his original position.

(3) Existing law prescribes conditions for the payment of disability allowances to members.

This bill would authorize the Teachers' Retirement Board to limit the payment of a disability allowance to a period of 2 years in cases of potential physical or vocational rehabilitation or controlled substance abuse.

(4) Existing law terminates a member disability allowance if earnings in any 1 month are equal to or exceed 0035% of the compensation upon which the disability allowance was based.

This bill would delete such existing law and, instead, would terminate a disability allowance to a member if the average earnings for any continuous 6-month period are equal to or exceed 0035% of final compensation upon which the disability allowance was based, and would authorize reinstatement of the disability allowance if earnings fall below 0035% of final compensation.

The people of the State of California do enact as follows:

SECTION 1. Section 23902 of the Education Code is amended to read:

23902.

A member may apply for a disability allowance if he has five or more years of credited service provided that:

(a) At least four years were credited for actual service performed in a position requiring membership in the system;

(b) The last five * * * years of credited service have been served in this state; and

(c) The member has not attained age 60 years, or has unused sick leave with sufficient days to have him receive salary on account of such sick leave to age 60 years * * *.

(d) Nothing in this section shall affect the right of a member to a disability allowance if the reason that the member has less than four years of actual service is due to an on-the-job injury or disease in a position requiring membership in the system.

SEC. 2. Section 23904.5 of the Education Code is amended to read:

23904.5.

Any member with a disabling impairment which is amenable to treatment that could be expected to restore ability to work shall be deemed to be under a disability if:

(a) Undergoing therapy prescribed by the member's treatment sources but the impairment has continued to be disabling or can be expected to be disabling for at least 12 months;

(b) Evidence, excluding that developed under Section 139.5 of the Labor Code, indicates that additional training may allow the member to perform in a comparable position; or

(c) Evidence, excluding that developed under Section 139.5 of the Labor Code, indicates that a rehabilitation program may allow the member to return to the member's original position or perform in a comparable position.

Such member who willfully fails to follow prescribed treatment, or take additional training, or who refuses to accept rehabilitation services made available to him by a rehabilitation program approved by the board cannot be found disabled. Willful failure to follow prescribed treatment does not exist if there is good cause for failure to follow such treatment. In determining whether a member has good cause for failure to follow such treatment, the board shall take into account whether such treatment would abridge the member's right to the free exercise of his religion.

SEC. 3. Section 23905 of the Education Code is amended to read:

23905.

The disability allowance shall accrue and become payable as provided in Section 24000.

However, in those cases of potential physical or vocational rehabilitation, or willful controlled substance abuse, the board may limit the payment of or disability allowance to any such member to a period of two years.

SEC. 4. Section 23910 of the Education Code is amended to read:

23910.

If a person who begins to receive a disability allowance after June 30, 1972, is employed, or is self-employed in any capacity in which his average earnings * * *

stitution and shall go into immediate effect. The facts constituting such necessity are:

Due to the recent adoption of endorsements to standard fidelity bonds issued in this state, which endorsements are unacceptable to the Department of Insurance, underwritten title companies are encountering extreme difficulty in obtaining fidelity coverage which is a necessary prerequisite to their conducting an escrow business. This inability to obtain coverage which is satisfactory to the Department of Insurance has resulted in the issuance of cease and desist orders by the department and may result in the future issuance of similar orders affecting the right of underwritten title companies to continue to do business in this state. It is therefore necessary to provide an alternative to a fidelity bond so as to permit underwritten title companies to continue to conduct their business in this state. It is therefore necessary that this act take effect immediately.

Approved and filed July 27, 1979.

PUBLIC OFFICERS—LOCAL SAFETY OFFICERS—RIGHTS

CHAPTER 405

ASSEMBLY BILL NO. 1807

An act to add Section 3309.5 to the Government Code, relating to local public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law contains the Public Safety Officers Procedural Bill of Rights Act, which prescribes various rights of specified state and local public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription of the interrogation, and representation, and specifies other rights of such state and local public safety officers with regard to discrimination and discipline.

This bill would make it unlawful for any local public safety department to deny or refuse to any local public safety officer such rights and protections, and would give the superior court initial jurisdiction over any proceeding by a local public safety officer against a local public safety department for violations of such rights.

This bill would also permit the superior court to grant appropriate injunctive or other extraordinary relief to remedy violations and to prevent future violations with regard to local public safety officers.

This bill would specify that it shall apply only to local public safety officers, and not to state public safety officers.

The people of the State of California do enact as follows:

SECTION 1. Section 3309.5 is added to the Government Code, to read:

3309.5.

(a) It shall be unlawful for any local public safety department to deny or refuse to any local public safety officer the rights and protections guaranteed to them by this chapter.

(b) The superior court shall have initial jurisdiction over any proceeding brought by any local public safety officer against any local public safety department for alleged violations of this section.

(c) In any case where the superior court finds that a local public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the local public safety department from taking any punitive action against the local public safety officer.

(d) This section shall apply only to local public safety officers who are peace officers as defined in Section 830.1 of the Penal Code, and shall not apply to public safety officers who are peace officers as defined in subdivisions (a) and (b) of Section 830.2 of the Penal Code.

Approved July 27, 1979.

Filed July 30, 1979.

MUNICIPAL AND SUPERIOR COURTS—ORANGE COUNTY

CHAPTER 406

ASSEMBLY BILL NO. 291

An act to amend Sections 69099.5, 74003, 74004, and 74005 of the Government Code, relating to courts.

LEGISLATIVE COUNSEL'S DIGEST

Existing law specifies the salaries, number, and classification of the officers and employees of the municipal and superior courts in Orange County.

This bill would revise the salaries, number, and classification of specified officers and employees of the municipal and superior courts in Orange County.

Under existing law, Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill provides that no appropriation is made by this act pursuant to Section 2231 or 2231 for a specified reason, but recognizes that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

re: Public Safety Officers

PUBLIC SAFETY OFFICERS—POWERS AND DUTIES

CHAPTER 1367

ASSEMBLY BILL NO. 2977

An act to amend Section 3309.5 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law makes it unlawful for any local public safety department to deny or refuse to any local public safety officer the rights and protections of the act, gives the superior court initial jurisdiction over any proceeding by a local public safety officer against a local public safety department for violations of such rights, and also permits the superior court to grant appropriate injunctive or other extraordinary relief to remedy violations and to prevent future violations with regard to local public safety officers.

This bill would extend such provisions to state public safety officers as well as local public safety officers.

The people of the State of California do enact as follows:

SECTION 1. Section 3309.5 of the Government Code is amended to read:

3309.5.

(a) It shall be unlawful for any * * * public safety department to deny or refuse to any * * * public safety officer the rights and protections guaranteed to them by this chapter.

(b) The superior court shall have initial jurisdiction over any proceeding brought by any * * * public safety officer against any * * * public safety department for alleged violations of this section.

(c) In any case where the superior court finds that a * * * public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the * * * public safety department from taking any punitive action against the * * * public safety officer. * * *

[Became law without Governor's approval. Filed Oct. 1, 1980.]

PUBLIC OFFICERS AND EMPLOYEES—PUBLIC SAFETY—PEACE OFFICERS

Assembly Bill No. 2641

CHAPTER 944

An act to amend Section 3301 of the Government Code, relating to public safety officers.

[Approved by Governor September 10, 1982. Filed with Secretary of State September 13, 1982.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2641, Cortese. Public safety officers: peace officers.

Existing law provides for the Public Safety Officers Procedural Bill of Rights and defines a public safety officer as including sheriffs, policemen, marshals, constables, district attorney investigators, and all state employees who are peace officers.

This bill would include in the definition of public safety officers, for the purposes of the bill of rights, specified local government agency employees who are peace officers.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill would provide that no appropriation is made by this act for the purpose of making reimbursement pursuant to the constitutional mandate or Section 2231 or 2234, but would recognize that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

This bill would provide that notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of the act would remain in effect unless and until they are amended or repealed by a later enacted act.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31 except subdivisions (f) and (i), 830.4 except subdivision (f), and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 2. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 3. Notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of this act shall remain in effect unless and until they are amended or repealed by a later enacted act.

SCHOOL DISTRICTS—POLICE DEPARTMENTS—ESTABLISHMENT

Assembly Bill No. 3764

CHAPTER 945

An act to amend Sections 39670, 39671, 39672, 39673, and 72330 of the Education Code, relating to police departments.

[Approved by Governor September 10, 1982. Filed with Secretary of State September 13, 1982.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3764, Kapiloff. School and community college districts: police departments.

Existing law permits the governing board of any school district to establish a security department and employ, as specified, such personnel as may be necessary to ensure the security of school district personnel and pupils and the security of district property, and to cooperate with the local law enforcement agencies in matters involving those concerns. Persons employed and compensated as members of a school district security department, when appoi

PUBLIC SAFETY OFFICERS—BILL OF RIGHTS—INCLUSION OF PEACE OFFICERS

Assembly Bill No. 1216

CHAPTER 964

An act to amend Section 3301 of the Government Code, relating to public safety officers and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 20, 1983. Filed with Secretary of State September 21, 1983.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1216, Cortese. Public safety officers: peace officers.

Existing law provides for the Public Safety Officers Procedural Bill of Rights and defines a public safety officer as including specified peace officers.

This bill would include in the definition of peace officers, for the purposes of the Bill of Rights, security officers of a municipal utility district.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill would create a state-mandated local program by imposing new duties on specified local agencies.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31 except subdivision (f), 830.4 except subdivision (f), and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public

safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 2. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

It is in the interest of public safety to insure the continuance of stable relations between public safety employees and their employers which this act will provide.

MOTOR VEHICLES—RECKLESS DRIVING—PUNISHMENT

Assembly Bill No. 1616

CHAPTER 965

An act to amend Section 23104 of the Vehicle Code, relating to traffic offenses.

[Approved by Governor September 20, 1983. Filed with Secretary of State September 21, 1983.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1616, Chute. Vehicles: reckless driving.

Under existing law, the penalty for reckless driving causing bodily injury is imprisonment in the county jail for not less than 30 days nor more than 6 months, or a fine of not less than $220 nor more than $500, or both the fine and imprisonment.

This bill would authorize a sentencing court to impose in lieu of the prescribed jail term, a felony sentence of imprisonment in the state prison for 16 months, or 2 or 3 years, on any person convicted of reckless driving which proximately causes great bodily injury, as defined, who previously has been convicted of violating designated provisions dealing with reckless driving, speed contests, or driving under the influence of alcohol or drugs, or both.

SEC. 65. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

HIGHWAYS—SAN PABLO AVENUE—MAINTENANCE AND OPERATION COSTS

CHAPTER 1164

S.B.No. 1716

AN ACT to add and repeal Section 380.3 of the Streets and Highways Code, relating to highways, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 29, 1989.]

[Filed with Secretary of State September 30, 1989.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1716, Boatwright. Highways: San Pablo Avenue.

Under existing law, the Department of Transportation is required to improve and maintain state highways, and funds are appropriated to the department for these purposes.

This bill would authorize the department to pay annually to Contra Costa County and each of the Cities of El Cerrito, Richmond, San Pablo, Pinole, and Hercules the added costs of maintenance and operation of San Pablo Avenue caused by increased traffic detoured onto that avenue because of specified construction work on State Route 80, thereby making an appropriation. These provisions would be repealed as of the date the department certifies to the Secretary of State that the construction is complete.

The bill would provide that it becomes effective only if AB 488 is enacted and becomes effective.

The bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 380.3 is added to the Streets and Highways Code, to read:

380.3. There will be increased motor vehicle traffic on San Pablo Avenue in the County of Contra Costa and the Cities of El Cerrito, Richmond, San Pablo, Pinole, and Hercules because traffic will be detoured onto San Pablo Avenue during construction work on State Route 80 to convert the existing shoulder to additional traffic lanes. Because of the increased traffic caused by the detour, the department may pay annually to that county and each of those cities the added costs of maintenance and operation of San Pablo Avenue.

This section shall remain in effect only until the department certifies to the Secretary of State that construction is complete on the project on State Route 80 in Contra Costa County to convert the existing shoulder to additional traffic lanes, and as of the date of that certification is repealed.

SEC. 2. Section 380.3 of the Streets and Highways Code shall become effective only if Assembly Bill 488 of the 1989–90 Regular Session is enacted and becomes effective.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that repairs to San Pablo Avenue caused by the increased traffic detoured from State Route 80 may commence as soon as possible, it is necessary that this act take effect immediately.

PEACE OFFICERS

CHAPTER 1165

S.B.No. 353

AN ACT to amend Section 25755 of the Business and Professions Code, to amend Sections 39671 and 72330 of the Education Code, to amend Section 3332 of the Food and Agricultural Code, to amend Sections 3301, 9194.5, 14613, and 74368 of the Government Code, to amend Section 12020 of the Health and Safety Code, to amend Sections 488.6, 557.5, 557.6, and 669.5 of the Insurance Code, to amend Section 3600.3 of the Labor Code, to amend Sections 148.5, 190.2, 409.5, 409.6, 830, 830.1, 830.2, 830.3, 830.5, 830.6, 830.7, 830.8, 830.9, 830.10, and 12026.5 of, to add Sections 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.38, and 13526 to, to amend and renumber Section 830.32, to repeal and add Sections 830.31 and 830.4 of, and to add Article 4 (commencing with Section 13510) to Chapter 1 of Title 4 of Part 4 of, the Penal Code, to amend Section 10334 of the Public Contract Code, to amend Section 4156 of the Public Resources Code, to amend Sections 8226, 12820, 22558, and 30501 of the Public Utilities Code, to amend Section 25258 of the Vehicle Code, and to amend Sections 4313 and 4493 of the Welfare and Institutions Code, relating to peace officers.

[Approved by Governor September 30, 1989.]

[Filed with Secretary of State September 30, 1989.]

LEGISLATIVE COUNSEL'S DIGEST

SB 353, Presley. Peace officers.

(1) Under existing law, several code sections in the Penal Code classify various officers and employees of state and local agencies as peace officers.

This bill would recast those sections by designating peace officers in the several sections of the Penal Code according, in part, to the officers' and employees' occupation. The bill would add to the listing of peace officers security officers of the California State Police Division and security officers of the Hastings College of the Law. The bill would also make numerous conforming and technical changes.

(2) Existing law requires the Commission on Peace Officer Standards and Training to pay from the Peace Officers' Training Fund to each eligible local government agency state aid for training expenses of full-time regular paid employees of the eligible agencies.

This bill would prohibit an allocation from the fund to a local governmental agency if the agency was not entitled to receive funding from the fund in accordance with the law as it read on December 31, 1989.

(3) Existing law requires the Commission on Peace Officer Standards and Training to undertake certain training programs regarding peace officers.

This bill would require any person or persons desiring peace officer status under the law who, on January 1, 1990, were not entitled to be designated as peace officers to request the Commission on Peace Officer Standards and Training to undertake a feasibility study, as specified, regarding designating the person or persons as peace officers. It would require the request and study to be undertaken in accordance with regulations

adopted by the commission. The bill would authorize the commission to charge any person requesting a study, a fee, not to exceed the actual cost of undertaking the study. It would require the commission to issue its study and recommendations within 18 months of the request and to provide a copy of the same to the Legislature.

The bill would provide that a section included in the Briggs Death Penalty Initiative Act, proposed to be amended by this bill, shall become effective only when approved by the voters.

This bill would incorporate changes in Section 25755 of the Business and Professions Code and Sections 830.1, 830.2, 830.3, 830.6, 830.7, and 12028.5 of the Penal Code to be operative only if specified applicable bills (e.g. SB 352, SB 1351, SB 1678, AB 1506, AB 1688, and AB 2089) are chaptered, as provided, and this bill is chaptered last.

The bill would also incorporate changes in Section 25258 of the Vehicle Code made by Chapter 245 of the Statutes of 1989.

The people of the State of California do enact as follows:

SECTION 1. Section 25755 of the Business and Professions Code is amended to read:

25755. The director and the persons employed by the department for the administration and enforcement of this division are peace officers in the enforcement of the penal provisions of this division, the rules of the department adopted under the provisions of this division, and any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors, and such persons are authorized, while acting as peace officers, to enforce any penal provisions of law while they are in, on, or about any licensed premises in the course of their employment.

The director, the persons employed by the department for the administration and enforcement of this division, and peace officers listed in Section 830.1 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

Members of the California State Police and peace officers of the Department of Parks and Recreation, as defined in subdivisions (b) and (g) of Section 830.2 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee located on state property at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

SEC. 1.1. Section 25755 of the Business and Professions Code is amended to read:

25755. The director and the persons employed by the department for the administration and enforcement of this division are peace officers in the enforcement of the penal provisions of this division, the rules of the department adopted under the provisions of this division, and any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors, and such persons are authorized, while acting as peace officers, to enforce any penal provisions of law while * * * in the course of their employment.

The director, the persons employed by the department for the administration and enforcement of this division, and peace officers listed in Section 830.1 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

Members of the California State Police and peace officers of the Department of Parks and Recreation, as defined in subdivisions (b) and (g) of Section 830.2 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee located on state property at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

SEC. 2. Section 39671 of the Education Code is amended to read:

39671. Persons employed and compensated as members of a police department of a school district, when appointed and duly sworn, are peace officers, for the purposes of carrying out their duties of employment pursuant to Section 830.32 of the Penal Code.

SEC. 3. Section 72330 of the Education Code is amended to read:

72330. The governing board of a community college district may establish a community college police department, under the supervision of a community college chief of police, and employ, in accordance with the provisions of Chapter 4 (commencing with Section 88000) of Part 51 that personnel as may be necessary to enforce the law on or near the campus of the community college and on or near other grounds or properties owned, operated, controlled, or administered by the community college or by the state acting on behalf of the community college. Each campus of a multicampus community college district may designate a chief of police.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers as defined * * * in Chapter 4.5 (commencing with Section * * * 830) of Title 3 of Part 2 of the Penal Code.

SEC. 4. Section 3332 of the Food and Agricultural Code is amended to read:

3332. The board has authority to do any of the following:

(a) Contract.

(b) Accept funds or gifts of value from the United States or any person to aid in carrying out the purposes of this part.

(c) Conduct or contract for programs, either independently or in cooperation with any individual, public or private organization, or federal, state, or local governmental agency.

(d) Establish and maintain a bank checking account or a savings and loan association account, approved by the Director of Finance in accordance with Sections 16506 and 16605 of the Government Code, for depositing funds appropriated to the California Exposition and State Fair pursuant to subdivision (a) of Section 19622 of the Business and Professions Code. The Department of Finance shall audit the account at the end of each fiscal year.

(e) Make or adopt all necessary orders, rules, or regulations for governing the activities of the California Exposition and State Fair.

(f) Delegate to the officers and employees of the California Exposition and State Fair the authority to appoint civil service personnel according to state civil service procedures.

(g) Delegate to the officers and employees of the California Exposition and State Fair the exercise of powers vested in the board as the board may deem desirable for the orderly management and operation of the California Exposition and State Fair.

(h) Appoint all necessary marshals and police to keep order and preserve peace at the California Exposition and State Fair premises on a year-round basis who shall have the powers of peace officers specified in Section 830.2 of the Penal Code. A member of the California State Police Division may be employed as * * * a marshal or police officer while off duty from his or her regular employment, subject to those conditions as may be set forth by the Chief of the California State Police. At least 75 percent of the persons appointed pursuant to this subdivision shall possess the basic certificate issued by the Commission on Peace Officers Standards and Training. The remaining 25 percent may be appointed if the person has completed a Peace Officer Standards and Training certified academy or possesses a Level One Reserve Certificate (as defined in Section 832.6 of the Penal Code).

(i) Lease, with the approval of the Department of General Services, any of its property for any purpose for any period of time.

(j) Use or manage any of its property, with the approval of the Department of General Services, jointly or in connection with any lessee or sublessee, for any purpose approved by the board.

SEC. 5. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision

* * * (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4 * * *, and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 6. Section 9194.5 of the Government Code is amended to read:

9194.5. The Sergeant at Arms and Assistant Sergeants at Arms of each house shall have the powers and authority conferred by law upon peace officers listed in * * * Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code in all parts of the state in carrying out their duties, and shall not be liable to civil action for their acts in carrying out the orders of a Member of the Legislature presiding over any legislative proceeding, including sessions of the Legislature or either house thereof and hearings of legislative committees, or in carrying out the orders of a member to have any person removed from the office of the member, if the Sergeant at Arms or Assistant Sergeant at Arms acts without malice and in the reasonable belief that the member has the authority to issue the order.

SEC. 7. Section 14613 of the Government Code is amended to read:

14613. There is in the Department of General Services the California State Police Division.

The director shall appoint members and employees of the California State Police Division as may be necessary to protect and provide police services for the state buildings and grounds and occupants thereof. Members * * * of the California State Police Division have the powers of peace officers as defined in the Penal Code.

Members of the California State Police Division consist of the following: the chief, inspectors, captains, lieutenants, sergeants, * * * officers, and security officers. All other persons in the California State Police Division are considered employees.

The California State Police Division may provide for the physical security of any current or former constitutional officer of the state and any current or former legislator of the state.

Upon the request of the Chief Justice, the director, through the California State Police Division, may provide appropriate protective services to any current or former member of the state courts of appeal and the California Supreme Court.

SEC. 8. Section 74368 of the Government Code is amended to read:

74368. The marshal may make the following appointments:

(a) One assistant marshal.

(b) Four captains.

(c) Four lieutenants.

(d) Nineteen sergeants.

(e) One hundred sixty-three deputy marshals.

Any deputy marshal who may be assigned by the marshal to one of seven positions designated as lead deputy shall receive, while serving in that capacity, biweekly compensation at a rate 5 percent higher than that received by the deputy.

The marshal may, at his or her discretion, fill a deputy marshal or court service officer position by accepting a lateral transfer from another California peace officer agency. The transferee shall have completed a California P.O.S.T. certified basic academy and been employed for at least one year in a position enumerated in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, or 830.4 of the Penal Code within the past three years.

(f) One administrative secretary I, II, or III.

(g) One administrative services manager I, II, or III or administrative assistant III.

(h) Twenty intermediate typists.

(i) Six senior typists.

(j) Thirty-five field service officers.

Notwithstanding any other provisions of this article, in no event shall a field service officer's salary be less than 66 percent of the salary of a deputy marshal at the corresponding pay step. The field service officer is a peace officer trainee position which requires appointees to be at least 18 years of age and meet the qualifications and standards prescribed for deputy marshals. At the time an incumbent in the class of field service officer attains the age of 21, he or she may be appointed by the marshal to a position in the class of deputy marshal or court service officer, provided such position is open, without further qualification or examination.

A field service officer shall receive 66 percent of the uniform allowance prescribed for deputy marshals. In the event that a field service officer is appointed to the class of deputy marshal or court service officer, he or she shall receive the amount of reimbursement of the cost of required uniforms and equipment prescribed for a newly hired deputy marshal or court service officer, less any reimbursement received by him or her for the cost of required field service officer uniforms and equipment.

(k) One junior typist. Each vacancy occurring in this class shall cause a corresponding reduction in the number of junior typists hereby authorized, provided, however, that such vacancy shall increase by one, a position in the class intermediate typist under subdivision (h).

(l) Nine legal procedures clerks III.

(m) Thirty legal procedures clerks II or I.

(n) Sixty court service officers. In no event shall a court service officer's salary be less than 80 percent of a deputy marshal at the corresponding pay step. A court service officer shall receive the same uniform allowance prescribed for a deputy marshal, under the same conditions prescribed for deputy marshals. The marshal may appoint a court service officer to a vacant position of deputy marshal without further qualification or examination. In the event that a court service officer is appointed to the class of deputy marshal, he or she shall receive the amount of reimbursement prescribed for a newly hired deputy marshal, less any reimbursement received by him or her for the cost of required court service officer uniforms and equipment. Court service officers shall be peace officers pursuant to Section 830.4 of the Penal Code. Notwithstanding any other provision of law, court service officers shall be general members of the county employees retirement system.

Any court service officer who meets length of service, educational and performance requirements established by the marshal and approved by the county personnel director may receive a biweekly compensation at a rate 7½ percent higher than that otherwise received by a court service officer. The number of court service officer positions so compensated shall not exceed one-half the total number of court service officers then employed by the marshal.

(o) Any person specified in subdivisions (f), (h), and (i), who may be assigned by the marshal to one of the positions designated as executive secretary or administrative personnel secretary shall receive, while serving in that capacity, biweekly compensation at a rate 10 percent higher than that specified for such person's class and step.

(p) Two supervising legal services clerks.

(q) Three communications dispatchers I or II.

(r) Two administrative assistants III, II, I, or trainee.

(s) One EDP coordinator, or senior systems analyst.

(t) Notwithstanding Section 74369, up to 15 extra help positions (hourly rate) to be appointed at a level as determined by and serve at the pleasure of the marshal. Such appointments shall be temporary for a period not to exceed six months, plus one

setting forth the surcharge or surcharges, and the manner in which such surcharge or surcharges shall be collected, and instructing the county clerk to transmit, on the next business day following the adoption of the resolution, a copy of the resolution to the clerk of the municipal court.

CONTROLLED SUBSTANCES—FEDERAL FUNDING—REPORT OF USE OF FUNDS

CHAPTER 674

S.B.No. 2739

AN ACT relating to controlled substances.

[Approved by Governor September 9, 1990.]

[Filed with Secretary of State September 12, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2739, Roberti. Controlled substances: information.

Existing law does not contain provisions requiring state entities to submit reports concerning the goals to be achieved with the use of federal moneys which they receive in the war against the illegal manufacture, sale, smuggling, and use of controlled substances.

This bill would set forth legislative declarations and findings concerning illicit drug activity and the need to disseminate information concerning the war on drugs.

In addition, the bill would require certain state entities, when they receive federal moneys which are specifically earmarked as part of the President's "National Drug Control Strategy," to report to the Department of Finance, as specified, concerning the use of those moneys. The bill also would require the Department of Finance to analyze each of these reports and to submit its findings to the Legislature by a specified date.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature hereby finds and declares all of the following:

(1) California is one of the leaders in the nation in the illegal manufacture, sale, smuggling, and use of controlled substances.

(2) It is estimated that the annual cost of this problem to California's society is $6 billion.

(3) Success in the war on drugs depends in no small part on having comprehensive information wherever it is needed in order to make sound policy and operational decisions.

(4) This information management challenge is particularly acute given the number and diversity of federal, state, and local agencies involved in the drug war.

(5) It is not only a question of having enough information, but also a question of making the information that is available and the information which will become available accessible to those who are involved in the fight against drugs.

(6) Except for the small fraction of information in government hands that is sensitive and must be closely held, wider access to drug-related information is essential.

(7) California's drug war policy must be to maximize the sharing and use of relevant information among appropriate agencies, upon which coherent and coordinated policymaking depends.

(b) Whenever any one of the following entities receives federal moneys which are specifically earmarked as part of the President's "National Drug Control Strategy," that

entity, within 30 days after receiving the moneys, shall submit a report to the Department of Finance on the proposed use of, and goals to be achieved with, those moneys:

(1) Department of Alcohol and Drug Programs.

(2) Department of Corrections.

(3) State Department of Education.

(4) Department of Justice.

(5) Department of the Youth Authority.

(6) Office of Criminal Justice Planning.

In addition, each entity shall submit a report to the Department of Finance within 30 days after the end of each federal fiscal year specifying the actual use and level of attainment of those specified goals.

(c) The Department of Finance shall analyze each report submitted pursuant to subdivision (b) and shall submit its findings to the Legislature no later than 30 days after receiving each report.

PEACE OFFICERS

CHAPTER 675

A.B.No. 389

AN ACT to amend Sections 3301, 20017.99, and 71368 of the Government Code, to amend Sections 488.5, 557.5, 567.6, and 669.5 of the Insurance Code, and to amend Section 148.5 of the Penal Code, relating to peace officers, and making an appropriation therefor.

[Approved by Governor September 10, 1990.]

[Filed with Secretary of State September 12, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

AB 389, Peace. Peace officers.

(1) Existing law includes specified peace officers within the definition of a public safety officer for purposes of the "Public Safety Officers Procedural Bill of Rights Act."

Existing law permits persons who have been employed for at least one year in specified peace officer positions to make a lateral transfer to fill a position as a deputy marshal or court service officer.

Existing law prohibits an insurer, in issuing or renewing an insurance policy for the operation of a private motor vehicle, from increasing the premium on the policy of specified peace officers, because the peace officer was involved in an accident while operating an authorized emergency vehicle, as defined, in the performance of that peace officer's duty during the hours of employment.

Existing law also exempts specified peace officers from certain reporting requirements to the issuer of a private automobile insurance policy with regard to an accident under the above-described conditions.

Existing law requires, however, specified peace officers to submit, within 30 days, to the insurer, either a written declaration under penalty of perjury stating whether or not the peace officer was operating an authorized emergency vehicle in the performance of that peace officer's duty during the hours of employment or a copy of the incident report filed by the peace officer with his or her employer.

This bill would add to the list of specified peace officers subject to the above-described provisions, the officers of a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services.

(2) Existing law prohibits any insurer from failing to renew a private automobile insurance policy, as defined, to a peace officer, member of the California Highway Patrol, or firefighter, with respect to his or her operation of a private motor vehicle, for the reason that the insured has been involved in an accident while operating an authorized emergency vehicle, as defined, in response to his or her duties during the hours of employment.

This bill would add specified peace officers to the definition of peace officer for the purposes of the above provision, and would also add to the list of authorized emergency vehicles, as defined, for the purposes of this provision.

(3) Existing law provides that it is a misdemeanor to falsely report to the employees of specified state or local agencies who are assigned to accept these reports from citizens that a felony or misdemeanor has been committed.

This bill would also make it a misdemeanor to falsely report to the officers of a state hospital under the jurisdiction of the State Department of Mental Health and the State Department of Developmental Services that a felony or misdemeanor has been committed, thereby imposing a state-mandated local program by changing the definition of a crime.

(4) Under existing law, the Public Employees' Retirement Law defines "state peace officer/firefighter member" in terms of specified job classifications and provides higher retirement benefit formulas and higher employer and employee contribution rates for state peace officer/firefighter members than for state miscellaneous members.

This bill would include within the definition of a "state peace officer/firefighter member" specified peace officers of a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services. The inclusion of additional employees in that member category would increase the amount of the state's continuously appropriated monthly contributions, which would constitute a General Fund appropriation.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (c), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that * * * stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 2. Section 20017.99 of the Government Code is amended to read:

20017.99. "State peace officer/firefighter member" also includes state officers and employees who have been designated as a peace officer as defined in Sections 830.1, 830.2, 830.3, 830.38, 830.4, and 830.5 of the Penal Code, except patrol members, or a firefighter whose principal duties consist of active firefighting/fire suppression, who are either excluded from the definition of state employee in subdivision (c) of Section 3513 or is a supervisory employee as defined in Section 3522.1, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service, provided,

that those officers and employees have responsibility for the direct supervision of state peace officer/firefighter personnel specified in Sections 20017.95, 20017.96, 20017.97, and 20017.98. The Department of Personnel Administration shall, on an annual basis, determine which classes meet the above conditions and are not classes specified in Sections 20017.95, 20017.96, 20017.97, and 20017.98, and report its findings to the Legislature and to the Public Employees' Retirement System, to be effective July 1 of each year.

Any person so designated may elect, within 90 days of notification by the board, to remain subject to the service retirement benefit and the normal rate of contribution applicable prior to the effective date of this section by filing an irrevocable notice of election with the board. A member who so elects shall be subject to the reduced benefit factors specified in Section 21251.13 only for service also included in the federal system.

This section shall not become applicable to any member so designated until such time as a ruling or regulation authorizing the inclusion of persons so designated within the definition of "policeman or fireman" is issued by the federal agency for purposes of Section 218(d)(5)(A) of the Social Security Act.

SEC. 3. Section 74368 of the Government Code is amended to read:

74368. The marshal may make the following appointments:

(a) One assistant marshal.

(b) Four captains.

(c) Four lieutenants.

(d) Nineteen sergeants.

(e) One hundred sixty-three deputy marshals.

Any deputy marshal who may be assigned by the marshal to one of seven positions designated as lead deputy shall receive, while serving in that capacity, biweekly compensation at a rate 5 percent higher than that received by the deputy.

The marshal may, at his or her discretion, fill a deputy marshal or court service officer position by accepting a lateral transfer from another California peace officer agency. The transferee shall have completed a California P.O.S.T. certified basic academy and been employed for at least one year in a position enumerated in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.38, or 830.4 of the Penal Code within the past three years.

(f) One administrative secretary I, II, or III.

(g) One administrative services manager I, II, or III or administrative assistant III.

(h) Twenty intermediate typists.

(i) Six senior typists.

(j) Thirty-five field service officers.

Notwithstanding any other provisions of this article, in no event shall a field service officer's salary be less than 65 percent of the salary of a deputy marshal at the corresponding pay step. The field service officer is a peace officer trainee position which requires appointees to be at least 18 years of age and meet the qualifications and standards prescribed for deputy marshals. At the time an incumbent in the class of field service officer attains the age of 21, he or she may be appointed by the marshal to a position in the class of deputy marshal or court service officer, provided the position is open, without further qualification or examination.

A field service officer shall receive 65 percent of the uniform allowance prescribed for deputy marshals. In the event that a field service officer is appointed to the class of deputy marshal or court service officer, he or she shall receive the amount of reimbursement of the cost of required uniforms and equipment prescribed for a newly hired deputy marshal or court service officer, less any reimbursement received by him or her for the cost of required field service officer uniforms and equipment.

(k) One junior typist. Each vacancy occurring in this class shall cause a corresponding reduction in the number of junior typists hereby authorized, provided, however, that the

vacancy shall increase by one, a position in the class intermediate typist under subdivision (b).

(l) Nine legal procedures clerks III.

(m) Thirty legal procedures clerks II or I.

(n) Sixty court service officers. In no event shall a court service officer's salary be less than 80 percent of a deputy marshal at the corresponding pay step. A court service officer shall receive the same uniform allowance prescribed for a deputy marshal, under the same conditions prescribed for deputy marshals. The marshal may appoint a court service officer to a vacant position of deputy marshal without further qualification or examination. In the event that a court service officer is appointed to the class of deputy marshal, he or she shall receive the amount of reimbursement prescribed for a newly hired deputy marshal, less any reimbursement received by him or her for the cost of required court service officer uniforms and equipment. Court service officers shall be peace officers pursuant to Section 830.4 of the Penal Code. Notwithstanding any other provision of law, court service officers shall be general members of the county employees retirement system.

Any court service officer who meets length of service, educational and performance requirements established by the marshal and approved by the county personnel director may receive a biweekly compensation at a rate 7½ percent higher than that otherwise received by a court service officer. The number of court service officer positions so compensated shall not exceed one-half the total number of court service officers then employed by the marshal.

(o) Any person specified in subdivisions (f), (h), and (i), who may be assigned by the marshal to one of the positions designated as executive secretary or administrative-personnel secretary shall receive, while serving in that capacity, biweekly compensation at a rate 10 percent higher than that specified for that person's class and step.

(p) Two supervising legal services clerks.

(q) Three communications dispatchers I or II.

(r) Two administrative assistants III, II, I, or trainee.

(s) One EDP coordinator, or senior systems analyst.

(t) Notwithstanding Section 74369, up to 15 extra help positions (hourly rate) to be appointed at a level as determined by and serve at the pleasure of the marshal. These appointments shall be temporary for a period not to exceed six months, plus one additional period at the marshal's option, not to exceed six months. Notwithstanding any other provisions of this section, the marshal may fill these positions with persons employed for less than 91 working days during a fiscal year on a part-time basis.

(u) Notwithstanding Section 74369, the marshal may appoint up to six temporary extra help marshal student workers I, II, or III who shall be paid at an hourly rate and shall serve at the pleasure of the marshal. A marshal student worker I, II, or III shall receive an hourly salary at the rate equal to that specified for the class of student worker I, II, or III, respectively, in the unclassified service of the County of San Diego. Persons who graduate and receive a degree in the field which qualified them for appointment to a marshal student worker class may remain in the class and be employed on a full-time basis for up to six months from the first day of the month following their date of graduation.

(v) Two associate systems analysts or assistant systems analysts.

(w) Notwithstanding Section 74369, up to five provisional workers may be appointed by and serve at the pleasure of the marshal. The class of provisional worker provides for temporary appointments to positions in classes not listed in Section 74370 pending a review and evaluation of the duties of these positions by the marshal, and the establishment of specific classes as provided in this subdivision. Prior to the establishment of those classes, the county personnel director shall conduct a classification review and make recommendations to the marshal as to the establishment of the classes. The rate of pay for each individual employed in this class shall be within the range proposed for the class pending establishment, at a rate determined by the marshal following consultation with

the county personnel director. The rules regarding appointment and compensation as they relate to appointments to provisional workers shall be the same as those applicable to the class that is pending establishment. Appointments shall be temporary and shall not exceed six months. Employee benefits, if applicable, shall be equal to those granted to the class in the service of the County of San Diego to which the pending class will be tied for benefit purposes. When * * * an appointment is made, the class, compensation (including salary and fringe benefits), and number of such positions may be established by joint action of the marshal and the board of supervisors in accordance with established county personnel and budgetary procedures. The marshal may then appoint additional attachés to the classes of positions in the same manner as those for which express provision is made, and they shall receive the compensation so provided. Persons occupying provisional worker positions shall have their appointments expire not later than 30 calendar days following promulgation of a list of certified eligibles for the new class. Appointments to the new class shall continue at the stated compensation or as thereafter modified by joint action of the marshal and the board of supervisors.

(x) Notwithstanding any other provision of law, the number of positions in classifications authorized under subdivisions (b) to (s), inclusive, (u), (v) and (w) of this section may be increased by up to 100 additional positions by joint action of the majority of the judges and the board of supervisors in accordance with established county personnel and budgetary procedures. The rules regarding appointment and compensation (including salary and fringe benefits) as they relate to appointments of persons to these positions shall be the same as those applicable to the class of the positions. The action of the majority of the judges and the resolution of the board of supervisors adjusting those positions shall designate the class title or titles and number of positions to be added to each respective class. Any adjustment made pursuant to this subdivision shall be effective on adoption of the resolution by the board of supervisors and shall remain in effect only until January 1 of the second year following the year in which this subdivision becomes effective, unless earlier ratified by the Legislature. This subdivision shall remain in operation only until January 1 of the second year following the year in which it becomes operative, and as of that date is inoperative.

SEC. 4. Section 488.5 of the Insurance Code, as amended by Chapter 82 of the Statutes of 1990, is amended to read:

488.5. No insurer shall, in issuing or renewing a private automobile insurance policy to a peace officer, member of the California Highway Patrol, or firefighter, with respect to his or her operation of a private motor vehicle, increase the premium on that policy for the reason that the insured or applicant for insurance has been involved in an accident while operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code, in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code, or in subdivision (f) of Section 165 of the Vehicle Code, in the performance of his or her duty during the hours of his or her employment.

As used in this section:

(a) "Peace officer" means every person defined in Section 830.1, subdivisions (a), (b), (c), (d), (e), (g), and (h) of Section 830.2, subdivisions (a), (b), and (d) of Section 830.31, subdivisions (a) and (b) of Section 830.32, subdivisions (a), (b), (c), (d), and (e) of Section 830.33, subdivisions (a) and (b) of Section 830.5, and * * * Sections 830.38 and 830.6, of the Penal Code.

(b) "Policy" shall have the same meaning as defined in subdivision (a) of Section 660.

SEC. 5. Section 557.5 of the Insurance Code, as amended by Chapter 82 of the Statutes of 1990, is amended to read:

557.5. No peace officer, member of the California Highway Patrol, or firefighter shall be required to report any accident in which he or she is involved while operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code, in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code, or in subdivision (f) of Section 165 of the Vehicle Code in performance of his or her duty during the hours of his or her employment, to any person who has issued that peace officer,

member of the California Highway Patrol, or firefighter a private automobile insurance policy.

As used in this section:

(a) "Peace officer" means every person defined in Section 830.1, subdivisions (a), (b), (c), (d), (e), (g), and (h) of Section 830.2, subdivisions (a), (b), and (d) of Section 830.31, subdivisions (a) and (b) of Section 830.32, subdivisions (a), (b), (c), (d), and (e) of Section 830.33, subdivisions (a) and (b) of Section 830.5, and * * * Sections 830.38 and 830.6, of the Penal Code.

(b) "Policy" shall have the same meaning as defined in subdivision (a) of Section 660.

SEC. 6. Section 557.6 of the Insurance Code, as amended by Chapter 82 of the Statutes of 1990, is amended to read:

557.6. Any peace officer as defined pursuant to this section who has been involved in an accident shall submit to his or her private automobile insurer within 30 days of the accident his or her written declaration under penalty of perjury stating whether or not at the time of the accident he or she was operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code, in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code, or in subdivision (f) of Section 165 of the Vehicle Code in the performance of his or her duty during the hours of his or her employment. In lieu of a written declaration, the peace officer may submit to the private automobile insurer a copy of the incident report filed by the peace officer with his or her employer.

As used in this section, "peace officer" means every person defined in Section 830.1, subdivisions (a), (b), (c), (d), (e), (g), and (h) of Section 830.2, subdivisions (a), (b), and (d) of Section 830.31, subdivisions (a) and (b) of Section 830.32, subdivisions (a), (b), (c), (d), and (e) of Section 830.33, subdivisions (a) and (b) of Section 830.5, and * * * Sections 830.38 and 830.6, of the Penal Code.

SEC. 7. Section 669.5 of the Insurance Code is amended to read:

669.5. No insurer shall fail to renew any private automobile insurance policy of a peace officer, member of the California Highway Patrol, or firefighter, with respect to his or her operation of a private motor vehicle, for the reason that the insured has been involved in an accident while operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code or in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code or in subdivision (f) of Section 165 of the Vehicle Code, in performance of his or her duty during the hours of his or her employment. As used in this section, "peace officer" shall have the same meaning as defined in Section 830.1 of the Penal Code, subdivisions (a), (b), (c), (d), (e), (g) and (h) of Section 830.2 of the Penal Code, subdivisions (a), (b), and (d) of Section 830.31 of the Penal Code, * * * subdivisions (a) and (b) of Section 830.32 of the Penal Code, subdivisions (a), (b), (c), (d), and (e) of Section 830.33 of the Penal Code, Section 830.38 of the Penal Code, subdivisions (a) and (b) of Section 830.5 of the Penal Code, and Section 830.6 of the Penal Code.

SEC. 8. Section 148.5 of the Penal Code is amended to read:

148.5. (a) Every person who reports to any peace officer listed in Section 830.1 or 830.2, district attorney, or deputy district attorney that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.

(b) Every person who reports to any other peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor if (1) the false information is given while the peace officer is engaged in the performance of his or her duties as a peace officer and (2) the person providing the false information knows or should have known that the person receiving the information is a peace officer.

(c) Except as provided in subdivisions (a) and (b), every person who reports to any employee who is assigned to accept reports from citizens, either directly or by telephone, and who is employed by a state or local agency which is designated in Section 830.1, 830.2, subdivision (e) of 830.3, Section 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.38 or 830.4, that a felony or misdemeanor has been committed, knowing the report to

Additions or changes indicated by underline; deletions by asterisks * * *

be false, is guilty of a misdemeanor if (1) the false information is given while the employee is engaged in the performance of his or her duties as an agency employee and (2) the person providing the false information knows or should have known that the person receiving the information is an agency employee engaged in the performance of the duties described in this subdivision.

(d) This section does not apply to reports made by persons who are required by statute to report known or suspected instances of child abuse, dependent adult abuse, or elder abuse.

SEC. 9. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

VEHICLE LIENS—ENFORCEMENT PROCEDURES

CHAPTER 676

A.B.No. 1822

AN ACT to amend Section 9801 of, and to add Sections 9805, 9806, and 9808 to, the Vehicle Code, relating to vehicles.

[Approved by Governor September 10, 1990.]

[Filed with Secretary of State September 12, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1822, Katz. Vehicles: lien.

Existing law authorizes the Department of Motor Vehicles to collect the amount of a lien for delinquent registration by civil action and sale of the vehicle or another vehicle.

This bill would authorize the department to enforce the lien alternatively by the filing of a certificate with the county clerk requesting the entry of a judgment. The bill would prescribe the procedure for the filing of the certificate, entering of a judgment, and execution of a judgment. The bill would require the county clerk to enter a judgment, thus, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

The people of the State of California do enact as follows:

SECTION 1. Section 9801 of the Vehicle Code is amended to read:

9801. (a) When the registration of a vehicle is delinquent, the department may collect the amount of the lien on the vehicle plus costs, not to exceed two hundred fifty dollars ($250), by the filing of a certificate requesting judgment pursuant to Sect[illegible]905, or by

OFFICE OF
LABOR RELATIONS

CITY OF SACRAMENTO
CALIFORNIA

926 J STREET
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SACRAMENTO, CA
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FAX 916-264-8110

December 20, 1996

Ms. Jolene Mado-Eveland
Commission on State Mandates
1414 K Street Suite 315
Sacramento, CA 95814

Dear Ms. Mado-Eveland:

This is to confirm our discussion regarding a continuance until mid-January 1997 in the scheduling of the City of Sacramento's claim for costs associated with the implementation of the Police Officers Bill of Rights. Thank you for your assistance in this matter.

Sincerely,

Dee Contreras

Dee Contreras
Labor Relations Director

cc: Allan Burdick

DEPARTMENT OF
EMPLOYEE RELATIONS

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March 8, 1996

Mr. Kirk G. Stewart
Executive Director
Commission on State Mandates
1414 "K" Street, Suite 315
Sacramento, CA 95814

Re: CSM-4499 - City of Sacramento
Peace Officers Procedural Bill of Rights

Dear Mr. Stewart:

The purpose of this letter is to provide the Commission on State Mandates with the information needed to complete the City's test claim. Your letter of January 26, 1996, requested the City provide you with the particular statutory code sections added or amended with each chaptered bill included in our test claim on the Peace Officers Procedural Bill of Rights. Based on your telephone conversations with Allan Burdick, Director of the California Cities SB 90 Service, I understand that the following statement will meet all requirements to comply with your request:

> All provisions of the Public Safety Officers Procedural Bill of Rights Act are contained in Sections 3300-3311, Chapter 9.7, Division 4, title 1, of the Government Code. The Public Safety Officers Procedural Bill of Rights was added to the Government Code in 1976 and amended in 1977, 1978, 1979, 1980, 1982, 1983, 1989, 1990, and 1994. All of the statutes listed in the City of Sacramento's test claim alleging the Public Safety Officers Procedural Bill of Rights to be a reimbursable state mandated local program added or amended the various provisions of this Act.

To facilitate your review, I have asked Mr. Burdick to provide your staff with a copy of the March 1995 edition of the California Public Employee Relations "Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act". The pocket guide provides a description of the basic rights and obligations conferred by the statute and a guide to the case law that has arisen since passage in 1976.

If you should need any additional information to complete the test claim, please let me know.

Sincerely,

Dee Contreras
Labor Relations Director

OFFICE OF
LABOR RELATIONS

CITY OF SACRAMENTO
CALIFORNIA

926 J STREET
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SACRAMENTO, CA
95814-2716

PH 916-264-5424
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December 6, 1996

Mr. Kirk G. Stewart
Executive Director
Commission on State Mandate
1414 K Street
Sacramento, CA 95814

RE: CSM - 4499 Police Officer Bill of Rights

Dear Mr. Stewart:

The City of Sacramento has filed a test claim which seeks a determination that Chapter 465, Statutes of 1976, together with Government Code Sections 3300-33004, generally referred to as the Police Officers Bill of Rights (POBAR), imposes a reimbursable state mandate on local agencies. The Department of Finance, following a review and analysis of our test claim which was requested by your Commission, has responded as follows:

> We have concluded that the statutes cited do not contain a reimbursable state mandate to local government. We believe that *Skelly v State Personnel Board, 15 Cal.3d194(Cal 1975*), which predates the enactment of Chapter 465, Statues of 1976 would require local agencies to conduct the activities cited in Government Code Sections 3303(g) and 3304(b). Specifically, as noted in the attachment to this letter, "Skelly" effectively requires that a permanent civil service employee facing a proposed disciplinary action must, under the due process requirement of the state and federal constitutions, be afforded specified procedural rights, including notice of a proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based and the right to respond to those charges, i.e. to have a hearing. Therefore the costs associated with conducting administrative hearings and providing copies of transcripts or recordings of interrogations are required under case law, which predates the enactment of Chapter 465/1976, and are not reimbursable by the State.

The Department of Finance is correct in citing "Skelly" as the basic law governing "due process requirements that govern what both California state and local governments must follow prior to a final deprivation of property to a permanent employee. The "Skelly"

case dealt with the dismissal of a State employee. As correctly stated in the Department of Finance's declaration by Diana Alonzo, the court said:

"While some form of notice and hearing must precede a final depravation of property to meet due process, the time and content of the notice and the nature of the hearing will depend on the appropriate accommodation of the competing interests involved."

"Since preremoval safeguards for a permanent civil service employee must include, as a minimum notice of the proposed action, the reasons therefor, a copy of the charges, and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing the discipline, the California Civil Service Act, which affords a permanent employee none of these prior procedural rights, violates due process, even though a employee is entitled to a full evidentiary hearing ..."

The basic intent of the City's test claim is to seek reimbursement of **costs associated with activities specifically afforded peace officers that go beyond what the court has set as minimum requirements for public employees.** These are activities which the State put in place for labor relations purposes, not to comply with the minimum due process requirements of "Skelly". This is supported by the language in section 3301 of the act, in which the Legislature stated that it "finds and declares that effective law enforcement depends on the maintenance of stable employer-employee relations, between public safety employees and their employers." "In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated with the State of California."

There are at least two areas in which the POBAR goes beyond "Skelly". They are (1) activities that are outside of discipline, and (2) additional requirements for disciplinary actions.

POBAR is substantially broader than Skelly, in that it covers matters beyond of what is covered by Skelly . In addition to termination and discipline, it covers activities that are normally related to employee relations, such as transfers for non-disciplinary reasons and changes in status for non-disciplinary reasons. Typically these are areas where the employee does not want to accept the change in his or her assignment.

POBAR, in some cases adds notice and hearing requirements prior to any disciplinary action is taken (Skelly is limited to procedures after an action has occurred) and it also expands the scope of what constitutes punitive action. POBAR defines punitive action as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. As such, a peace office is entitled to an opportunity of administrative appeal for any reduction in salary resulting from an administrative decision including loss of skill pay, pay grade, rank, or probationary rank.

POBAR also affords peace officers additional procedural requirements in disciplinary cases which go beyond the minimum requirements needed to comply with Skelly and those granted to other public employees. One example is contained in section 3303 (g) which states, "the complete interrogation of a public safety officer may be recorded." "If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time."

At this point, we believe the most productive way to resolve any differences of opinion on what Skelly requires is to have a face to face meeting between the various interested parties. At that meeting we can attempt to agree on what Skelly covers, what is mandated by POBAR, and what are the differences. Once we conclude that exercise, we can provide you with what we believe to be the additional requirements local agencies must complete to comply with the state statutory scheme.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge, except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

Sincerely,

Dee Contrereas

Dee Contrereas
Director of Labor Relations

DECLARATION OF SERVICE

I, Janice M. Beaman, do hereby declare under penalty of perjury as follows:

1. I am over the age of eighteen years old.

2. On December 9, 1996, I served the attached letter upon the following individuals by first class mail.

League of California Cities
1400 K Street, Suite 400
Sacramento, CA 95814

Mr. Kirk G. Stewart, Executive Director
Commission on State Mandate
1414 K Street
Sacramento, CA 95814

Mr. Jim Apps
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Mr. Glenn Engle
Div. of Accounting & Reporting
State Controller's Office
3301 C Street, Room 501
Sacramento, CA 95816

Mr. Allan Burdick, Vice President
David M. Griffith & Assoc.
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

I declare under penalty of perjury that the above is true and correct.

Signed this 9th day of December, 1996, at Sacramento, California.

Janice M. Beaman

OFFICE OF
LABOR RELATIONS

CITY OF SACRAMENTO
CALIFORNIA

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September 5, 1997

Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

RE: CSM - 4499 Police Officer Bill of Rights

Dear Ms. Higashi,

The following information is submitted in order to clarify our earlier filed test claim and pursuant to our meeting subsequent to that filing.

In POBR, beginning with Section 3303. Investigations and interrogations; conduct; conditions; representation; reassignment, the section clearly indicates action which occurs before any act which would trigger rights under *Skelly*. Eligible employees are covered by this section even if discipline does not occur at some future date. As the entry paragraph to that section states:

> When any public safety officer is under investigation and subjected to interrogation...that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purposes of this chapter, punitive action means any action *that may lead to* dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for the purposes of punishment. (emphasis added)

Clearly, the investigation and interrogation precede the punitive action listed by the underlined "that may lead to." Additionally, rights under *Skelly* would not be applicable to a written reprimand or transfer. However, if a transfer from some type of special assignment occurs such as SWAT, Field Training Officer, Motor Officer, or other assignment such as Night Shift which pays a premium pay, the employer is required under this section to prove that the transfer was not made for the purposes of punishment. If an employee asserts the transfer is a form of punishment, such assertion could lead to a hearing otherwise not provided or available under *Skelly*. Further, paragraph (a) of Section 3303 places further restrictions on an employer which increase costs to an employer.

Paragraph (a) places restrictions on when an employee is interviewed. It requires that an employee be interviewed "at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer... ." If a typical police department works three shifts, such as the Police Department for this City, two-thirds of the police force work hours not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate work a shift different than the employee(s) investigated. Payment of overtime occurs to the employee(s) investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section. This section alone creates an increase in costs to a public employer.

The following are several examples of situations where employees are afforded rights under POBR which, under *Skelly* would not apply:

1. Interrogation or interview.

2. Reduction in salary for transfer from special assignment where pay is decreased.

3. Written reprimand.

4. Transfer, even with no pay reduction, for the purposes of punishment.

5. Denial of promotion on grounds other than merit.

6. Minor suspensions (5, possibly 10 days, or less).

7. Release from probation.

In the above, costs would be associated with clerical and professional time to schedule and provide an administrative hearing or an interview or interrogation.

Not covered by *Skelly* are the internal pieces of an interrogation or interview related to a public safety officer in paragraphs (g), and (l) of Section 3303, where costs can be attached. These internal pieces occur even if the investigation or interrogation does not result in discipline.

Purchase of taping equipment and additional blank tapes.

Additional professional time required in order to accomplish taping. A clear record of the interview or interrogation is necessary if further action occurs.

Clerical time involved in transcribing the taped interview or interrogation, providing a copy of the tape to the employee and to provide copies of any notes, related reports and complaints pursuant to Section 3303.

Additional professional and clerical time in scheduling the interview if the public safety officer asserts their right to representation which usually is not immediately available.

In Section 3305. Comments adverse to interest; entry in personnel file or in other record; opportunity to read and sign instrument; refusal to sign also carry additional requirements. By statute, State and County employees have the ability in some fashion to respond to adverse comments placed in their personnel file. Employees of a City do not share that same statutory right. Sections 3305 and 3306 place further requirements upon the employer, and provide additional rights to the employee, again not available under *Skelly*.

Section 3305 provides to all covered public safety officers the right to first examine and sign any comment adverse to his interest before being placed in his personnel or other file used for personnel purposes. This requirement even goes beyond what is provided to State and County employees. A supervisor cannot simply present an employee with an adverse counseling memo and advise that it is being placed in the employee's personnel file, which is what occurs with an employee not covered by POBR. The public safety officer may also refuse to sign the adverse document, in which case that fact is noted on the document and signed or initialed by such officer. Section 3306 goes further into the response to such adverse comments.

Section 3306 provides a public safety officer the ability to file a written response to any adverse comment. State and County employees, including those not covered by POBR have a separate statutory right to respond to such comment or document. Except through language in either personnel rules or agreed upon in a collective bargaining agreement, both which can vary greatly, City employees not covered by POBR have no statutory right to respond to such documents. All public safety officers, including those employed by a City, have that right provided by this section of POBR. Although minimal, Sections 3305 and 3306 do have an impact in increased professional and clerical time.

Another significant difference between *Skelly* and POBR is in level of discipline which is covered. As mentioned earlier, *Skelly* would not apply in cases of transfers and letters of reprimand. Case law related to *Skelly* weakens the protection in suspension cases (*Civil Service Assn. v. City and County of San Francisco, 22 Cal 3d 552*) by allowing imposition of "minor" suspensions without procedural due process provided under *Skelly*. In the Civil Service case, "minor" was defined as five (5), possibly ten (10) days or less. Employers who impose such suspensions without such pre-suspension hearings, must provide that hearing under Section 3304 of POBR.

Section 3304. Lawful exercise of rights; insubordination; administrative appeal contains additional language not covered by *Skelly*. Portions of punitive action defined in POBR are covered by *Skelly*. 3304 (b) also includes "denial of promotion on grounds other than merit." This safeguard is another example where an administrative hearing required by POBR results in increased costs in professional and clerical time.

In the City of Sacramento, professional and clerical rates are estimated as follows:

Professional	$41.00 to $94.00 per hour
Clerical	$21.00 to $30.00 per hour

The rates vary due to level of clerical or professional employees assigned to particular tasks involved such as copying, transcribing, review before release of information, and scheduling and providing and administrative hearing. On average, the typical internal affairs interview is approximately forty-five (45)minutes in length. Upon request, a copy of the tape and transcription of an interview involves approximately four (4) hours of clerical time and approximately thirty (30) minutes of professional time. To provide a copy of the notes, complaints, reports as stated in POBR in an average Internal Affairs file would involve approximately two (2) hours of clerical time and approximately thirty (30) minutes of professional time. Professional time in the above examples would most likely be at the lower rate. The cost to provide an administrative hearing would be upwards to the greater rate depending upon the rank of command staff or management present for the hearing.

We hope this clarifies for the Commission our position that POBR is substantially broader than *Skelly*.

Should you have any questions, do not hesitate to contact me.

Sincerely,

Edward J. Takach
Labor Relations Officer

COMMENTS TO DRAFT STAFF ANALYSIS
Dated July 6, 1999
By CLAIMANT, CITY OF SACRAMENTO
CSM 4499
Peace Officers Procedural Bill of Rights
Government Code Sections 3300 through 3310

I, Dee Contreras, state:

That I am the Director of Labor Relations for the City of Sacramento, which position I have held since November, 1995. From 1990 until November 1995, I was the senior labor relations representative for the City of Sacramento. In these positions, my duties include negotiations with unions pursuant to the Meyers-Milias-Brown Act, contract administration, processing grievances, discipline review for police and fire, as well as miscellaneous employees. Thus, I have been personally responsible for the review of police discipline matters. In these positions, I have been involved in all areas of management labor relations.

I have been involved in the labor relations area since 1980. I was a labor union representative from August of 1980 until June of 1990. I represented employees in disciplinary actions and hearings. I represented and defended the employees and unions in grievances. I negotiated and reviewed civil service rules and their application. I was thus involved in all aspects of labor relations from the union side for this period of time.

From my substantial experience in representing both labor and management, I am extremely familiar with both the *Skelly* process as well as the Peace Officers Procedural Bill of Rights.

That I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

That I have read the Draft Staff Analysis of the Commission on State Mandates' staff dated July 6, 1999. Given the complex nature of the issues presented by this test claim, the Commission's staff has done an admirable job. However, there are certain issues which the City of Sacramento believes were not adequately addressed, or are not reflective of the reality of public sector labor relations.

Preliminarily, it should be noted that the City of Sacramento agrees that those duties required to be performed to satisfy the due process requirements of the United States' and California Constitutions pursuant to *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194 are preexisting constitutional requirements, and thus not a reimbursable mandate. It is those requirements which exceed *Skelly* and are required by the Peace Officers Procedural Bill of Rights that form the foundation for a reimbursable mandate.

In order to better understand the difference between *Skelly* and the Peace Officers Procedural Bill of Rights (hereinafter referred to as "POBAR", a brief outline of the two different systems is warranted.

1. General Description of *Skelly* and POBAR

The requirements of *Skelly* were aptly described by Justice Sullivan in his opinion, as follows:

> ". . . It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, . . . due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly, supra* at p. 215, *see* Draft Staff Analysis at page 161.

As the Draft Staff Analysis notes, these protections are required to be given to permanent civil service employees subject to dismissal, demotion, long term suspension and reduction in salary. These protections are not afforded to short term suspensions, reclassifications or reprimands. *See, Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-564; *Schultz* v. *Regents of University of California* (1984) 160 Cal.App.3d 768, 775-787; *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1441-1442.[1]

These protections are not afforded to employees who serve "at will", or at the pleasure of the appointing authority; there must be a legitimate claim of entitlement to continued employment before due process requires predisciplinary safeguards. *See, Board of Regents of State* Colleges v. *Roth* (1972) 408 U.S. 564, 577-578, 92 S.Ct. 2701, 2709-2710; *Shoemaker* v. *County of Los Angeles* (1995) 37 Cal.App.4th 618, 630-631; *Hill* v. *California State University, San Diego* (1987) 193 Cal.App.3d 1081, 1088.

Under *Skelly*'s progeny, there is also a "liberty" interest. This interest attaches when an employee is dismissed or not hired and the employing agency "makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose [] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's

[1] See more detailed discussion *infra* concerning written reprimands.

protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as, in this case, employment. [Citations omitted.]" *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308.

The purpose of a "liberty interest" hearing, which may occur after the discipline, is to provide a hearing to allow the person to clear his name. *Murden, supra* at 310.

In contrast to the very basic requirements which are afforded by either a "property" or "liberty" hearing, the requirements of POBAR are more stringent, both qualitatively and quantitatively.

Government Code, Section 3303 speaks to the rights of peace officers subject to "interrogation", and provides substantial safeguards. Section 3304 speaks to the rights of the peace officer regarding procedural safeguards, including the right to a hearing, and statute of limitations concerning how long the agency has to use acts as a basis for discipline. Those sections read as follows:

> 3303. When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.
>
> (a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.
>
> (b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent.

(f) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding. This subdivision is subject to the following qualifications:

(1) This subdivision shall not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.

(2) This subdivision shall not prevent the admissibility of statements made by the public safety officer under interrogation in any civil action, including administrative actions, brought by that public safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) This subdivision shall not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) This subdivision shall not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

(g) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any

reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

(h) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

(I) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(j) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

3304. (a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him or her with insubordination.

(b) No punitive action, nor denial of promotion on grounds

other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

(c) No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.

For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute "reason or reasons."

Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.

(d) Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is

incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(e) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(f) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(g) Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exist:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.

(h) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (e) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

From a brief review of just the foregoing sections, it is clear that the interests protected by POBAR far exceed the requirements of *Skelly*.

2. Written Reprimands Are Not Subject to *Skelly*

The Draft Staff Analysis on page 11, and particularly in footnote 20 thereon, and

thereafter, asserts that *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438 stands for the proposition that pursuant to *Skelly*, a permanent employee is entitled to a due process hearing when presented with a written reprimand. Under this rationale, any administrative hearing requested on a written reprimand would not be a reimbursable element of this test claim. The City of Sacramento respectfully disagrees with this conclusion, as *Stanton* stands for the proposition that *Skelly* specifically does not require any due process hearings in conjunction with a written reprimand.

Stanton involved a permanent peace officer employed by the City of West Sacramento, who received a written reprimand. The Memorandum of Understanding negotiated between the West Sacramento Police Officers Association and the City of West Sacramento[2], provided that written reprimands issued by a supervisor were appealable to the Chief of Police; and further that those written reprimands issued by the Chief of Police were appealable only to the Appointing Authority or his or her designee. As Stanton's written reprimand was issued by his supervisor, he appealed to the Police Chief, who held a hearing at which Mr. Stanton was represented by counsel, and presented evidence on his behalf. The Chief upheld the written reprimand and denied the appeal.

Not satisfied with the results of the appeal, Mr. Stanton filed a writ of mandate in superior court alleging that he was entitled to an administrative appeal pursuant to the City's personnel rules and MOU. Mr. Stanton further argued that the appeal rights afford him under the MOU conflicted with the due process rights guaranteed by *Skelly*.

Accordingly, when the matter was reviewed by the Appellate Court, the first issue undertaken was whether the MOU conflicted with the due process rights enunciated in *Skelly*. The court held that the guarantees of *Skelly* specifically do not apply to a written reprimand afforded a permanent employee, and to that effect, the court stated as follows:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in Skelly. Courts have required adherence to Skelly in cases in which an employee is demoted (Ng v. State Personnel Bd. (1977) 68 Cal.App.3d 600, 606 [137 Cal.Rptr. 387]); suspended without pay (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 558-560 [150 Cal.Rptr. 129, 586 P.3d 162]); or dismissed (Chang v. City of Palos Verdes Estates (1979) 98 Cal.App.3d 557, 563 [159 Cal.Rptr. 630]). We find no authority mandating adherence to Skelly when a written reprimand is

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[2] These Memoranda of Understanding are commonly referred to as "MOU"'s, and are authorized pursuant to the Meyers-Milias-Brown Act, Government Code, Sections 3500 *et seq.* *See, Santa Clara County District Attorney Investigators Association* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

issued.

> "We see no justification for extending Skelly to situations involving written reprimands. Demotion, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee." *Stanton, supra* at 1442; *see also* Draft Staff Analysis (July 6, 1999) at p. 311.

The case then goes on to find that the procedural details as outlined in the MOU comply with the Peace Officers Bill of Rights, particularly Government Code, Section 3304(b).

Accordingly, there are no preexisting requirements for an administrative hearing to satisfy the due process requirements of *Skelly* for a written reprimand absent the Peace Officer's Bill of Rights. The City of Sacramento respectfully requests that the Draft Staff Analysis be amended to so reflect.

3. **Transfer For Purposes of Punishment**

POBAR provides, in Government Code, Section 3304, that the employee subject to a transfer "for purposes of punishment" is entitled to an administrative appeal. The issue thus becomes what is a transfer for purposes of punishment, versus transfers for other issues, such as for management prerogative, to address staffing needs, or to compensate for a deficiency in performance. In the world of labor relations, often what constitutes a punitive transfer is in the eye of the employee. Accordingly, the City of Sacramento wishes the Commission to understand that in the field of labor relations, peace officers will often request a full POBAR hearing and procedure on a transfer which is not acceptable to the officer in question.

An analysis of cases involving transfers will demonstrate that the law in this area is quite clear: a transfer to punish for a deficiency in performance entitles the employee to a POBAR hearing, whereas a transfer to compensate for a deficiency in performance is not punitive and does not entitle one to a POBAR hearing. However, the difference is only noted by the court when an employee contests the denial of a hearing.

In *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756, two officers were transferred from the northern to the central division of the police department. While off duty, the officers had become involved in a minor incident in a local pub. One of the officers was exonerated, and the other's investigation was pending when the transfer order was made. Both officers were denied an administrative hearing and filed suit for preliminary injunction to preclude their transfers until after a POBAR hearing was held, contending that the transfers were punitive.

At the hearing, it was ascertained that the premise for the transfer by the department was that the department knew of the off duty conduct, as well as other conduct. Although the department viewed these officers as average with the potential for future advancement, the department believed

that a transfer to the central division would result in a more restricted geographical area with greater supervisory support. The department denied that the transfers were for a punitive reason.

The court, in reviewing the facts, believed that the transfers were punitive because of the officers' off duty conduct. Based upon that factor, the appellate court ruled that the issuance of a preliminary injunction to preclude the transfer pending a full POBAR hearing was appropriate: there would be no harm to the city in delaying the transfer, whereas to disallow a pretransfer hearing would be to divest the officers of any remedy at all.

A totally different view of transfer was contained in *Orange County Employees Association, Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289. This case involved Vaughn Roley, who was the division director of a probation facility for delinquent boys. After holding that position for 16 years, he was transferred to the post of director of juvenile court services. There was no difference in his title or pay; in fact, shortly after his transfer, he received a pay raise.

Mr. Roley contended that the purpose of the transfer was punitive. Prior to his transfer, one of his subordinates complained that Roley's subordinate had been sexually harassing. Additionally, there were questions concerning Mr. Roley's performance in the handling of certain trailer rentals, the disposal of cooking grease along an access road and use of a facility by a boy's club. This resulted in the chief probation officer questioning whether he had the right person in the position in question. Accordingly, the chief probation officer transferred Mr. Roley.

Mr. Roley contended that the transfer was punitive, whereas the chief probation officer contended it was not. Mr. Roley demanded, and was denied, a POBAR hearing, and this suit ensued.

The court spent much time analyzing the result of the transfer: there was no reduction in pay or decrease in benefits; most directors were rotated through various positions although Mr. Roley had spent more time in his position than most; no disciplinary action had been taken. The court that it could find no cases where a transfer, unaccompanied by actions adverse to the officer, were found to be punitive. In its discussion as to what constitutes a punitive transfer, the court spoke as follows:

> ". . . The flaw in Roley's argument is revealed in the first page of his reply brief: 'But Mr. Roley's transfer was punitive, since it was based on perceived deficient performance. Appellant assumes transfers based on performance deficiencies, whether perceived or real, are per se punitive. Deficiencies in performance are a fact of life. Right hand hitters sit on the bench against certain pitchers, some professors write better than they lecture, some judges are more temperamental with criminal cases than others. The manager, chancellor or presiding jurist must attempt to find the proper role for his personnel. Switching Casey from shortstop to second base because he can't throw to first as fast as Jones is not in and of itself

a punitive transfer.

> "The trial judge weighed and considered this very issue when it observed: '. . . it appears to the court that there is a difference between a transfer to punish for a deficiency in performance, versus a transfer to compensate for a deficiency in performance. In other words, if a person is deficient in performance and they are transferred someplace else where that deficiency will not matter or is compensated for by the new assignment, that is not necessarily punitive. It can be just the opposite of punitive. . . .'" *Supra* at 294; *See,* Draft Staff Analysis, page 278.

Thus, in considering what constitutes a transfer for purposes of punishment, it should be noted that frequently what constitutes punishment is in the eyes of the employee. Accordingly, in the finding of a mandate or subsequently in the preparation of Parameters and Guidelines, the foregoing should be kept in mind.

4. Adverse Comments

POBAR goes far beyond *Skelly* when it comes to adverse comments. In that respect, Government Code, section 3305 states as follows:

> No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer.

Adverse comments include such things as a report by an independent Board of Police Commissioners[3] and a Citizens Law Enforcement Review Board.[4]

The right to comment on any adverse comments or written reprimands consists of more than what one might think at first blush. First of all, there is a determination as to whether the

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[3] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347.

[4] *Caloca* v. *County of San Diego*, D029663, Fourth Appellate District, June 9, 1999, certified for publication.

comment is, in fact, adverse. A comment or report which may be neutral in management's view, might well be adverse in the eyes of the employee. The employee must have time to examine the comment and have the ability to respond. The employee will utilize work time to examine the comment and respond, and often responses are neither simple nor perfunctory. When the employee comments, management then will review the comment, attach it to the adverse comment, and file same with the employee's personnel file. All of this time is work time.

5. Tape Recording Of Interrogation And Documents Provided to Employee

The Draft Staff Analysis concludes that only in certain circumstances is the tape recording of an interrogation a reimbursable activity for the mandate in question, and states that no documents provided to the employee are reimbursable. We believe that this is too narrow a reading of the requirements of *Skelly*, and disregards the reality of labor relations.

As shown above, Government Code, Section 3303(g)[5] allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings. Furthermore, should the employer wish to interrogate the employee for a second time, the employee must be provided with a transcription of the prior interrogation, thus necessitating the use of a transcription service. Frequently, due to the nature of the matter at hand, expedited transcripts are necessary.

The Draft Staff Analysis opines that the due process clause requires employers to provide all materials upon which the disciplinary action is based, including the tape recording of the interrogation when a permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand[6]; or a probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal. (*See*, Draft Staff Analysis, page 17.)

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[5] It should be noted, that as originally enacted, the provision for tape recording was found in Government Code, Section 3303(f), as enacted in Chapter 465, Statutes of 1976, and stated, in pertinent part: "The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access tot he tape if further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . ." This section was amended by Chapter 775, Statutes of 1978, to make the tape recording optional.

[6] See discussion in part 2 above, wherein the City of Sacramento contends that written reprimands are not subject to *Skelly*, and thus steps required to be taken concerning written reprimands pursuant to POBAR constitutes a reimbursable mandate.

However, due process does not require that all materials upon which the foregoing disciplinary action is based be provided to the employee. All *Skelly* requires is "notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly* at 215. It does not require that all documents which bear upon the discipline be turned over to the employee. It further specifically does not "require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action." *Skelly* at 215. *See*, Draft Staff Analysis at 161.

At the outset, it should be noted that other than those employees covered by POBAR, no other employee has the right to tape record an interrogation. The Commission's staff has not pointed to any authority which provide the right to such employees, nor has any such authority been found.

Secondly, it must be noted that the employee who is protected by POBAR is not entitled to "discovery", a legal term denoting the ability to obtain written and oral evidence, including depositions and other materials from the other party prior to hearing. *See, Holmes* v. *Hallinan* (1998) 68 Cal.App.4th 1523, 1534; *Pasadena Police Officers Association* v. *City of Pasadena* (1990) 51 Cal.3d 564, 578-580.

Lastly, although *Skelly* requires that copies of the charges and other materials must be afforded, this does not include all investigative materials assembled by the department in the course of determining whether or not discipline is warranted. By finding that any subsequent tape recording is not a reimbursable mandate because same is required to be turned over under *Skelly* unnecessarily expands the category of "materials" required to be provided in order to afford due process. Instead of notice of the proposed action, a copy of the charges and related materials, the staff would have all investigative materials required to be turned over to the employee in question. This is not required by *Skelly* and results in the unwarranted expansion of its due process requirements.

As a matter of practice, as long as POBAR has been law, copies of all materials have been provided to the employee at the time of the *Skelly* notice, so that same can be used if the employee requests a POBAR hearing.

6. Conclusion

In conclusion, the City of Sacramento would first like to thank the Commission's staff for the work devoted to its Draft Staff Analysis. For one not accustomed to dealing in labor relations, the issues raised by this test claim can be daunting.

The impact of POBAR has gone beyond the giving of rights: it has created additional responsibilities for employer. There are a myriad of situations in which it can be invoked, which require the employer to either increase its level of activity, or risk being impacted by an employee or union through court actions, in their attempt to expand its coverage. Employee organizations are

sophisticated, and work diligently to expand the coverage of POBAR, either through court interpretations of the statutory scheme, or through legislative amendments. This necessitates that employers keep up to date on this fast changing area of the law. When that happens, employers have to review their policies and frequently expand the activities based on court decisions. If in application POBAR accomplished what it seeks to do on its face, it would be simple in its application. However, the legislation is more invidious and has created responsibilities for employers that have yet to be defined.

POBAR additionally has created areas of dispute and concern that don't exist for non-POBAR, miscellaneous employees. Just for example, there is a substantial difference in application between an administrative hearing and a due process review.

Something else which should be mentioned is the fact that POBAR is applicable to "at will" employees, which generally is applicable to management ranks and police chiefs. This has resulted in substantial effort in addressing management employees, who in no other area have the rights given to POBAR covered employees.

I intend to be present at the Commission's hearing of August 26, 1999, and will be happy to address any issues or questions about the practical application of this law.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 6th day of August, 1999 at Sacramento, California.

Dee Contreras

Dee Contreras

Filed 6/9/99

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

VICTOR CALOCA et al., Plaintiffs and Appellants, v. COUNTY OF SAN DIEGO et al., Defendants and Respondents.	D029663 (Super. Ct. No. 706089)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Reversed.

Everett L. Bobbitt and Sanford A. Toyen for Plaintiffs and Appellants.

John J. Sansone, County Counsel, Diane Bardsley, Chief Deputy County Counsel, and C. Ellen Pilsecker, Deputy County Counsel, for Defendants and Respondents.

The Citizens Law Enforcement Review Board (CLERB) reviewed citizen complaints and issued findings of serious misconduct against Sheriff Deputies Victor Caloca, Ronald Cuevas, Rick Simica, and William Smith (collectively Deputies). Deputies

together with the San Diego County Deputy Sheriffs Association (Sheriffs Association) brought a petition for writ of mandate to compel San Diego County (County) and San Diego County Civil Service Commission (Civil Service Commission) to conduct liberty interest hearings or alternatively an administrative appeal of CLERB's findings pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The trial court denied the petition, finding (1) Deputies are not entitled to liberty interest hearings because they had failed to show a present deprivation of liberty interests, and (2) Deputies are not entitled to an administrative appeal because they failed to show punitive action.

Deputies and Sheriffs Association appeal. We determine the trial court properly ruled Deputies are not entitled to liberty interest hearings since Deputies failed to show deprivation of a constitutionally protected liberty interest. However, we hold CLERB's findings of misconduct by Deputies constitute punitive action against them within the meaning of Government Code sections 3303 and 3304, subdivision (b). Therefore they are entitled to an administrative appeal pursuant to the Public Safety Officers Procedural Bill of Rights Act. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. CLERB -- General Enactment and Purpose

In 1990, County voters amended their charter to require County board of supervisors to establish CLERB. (S.D. Co. Charter, § 606.) Pursuant to the charter amendment, the board of supervisors enacted County of San Diego Ordinance No. 7880 (N.S.), adding Article XVIII (entitled "Citizens Law Enforcement Review Board") to the County's administrative code. "[CLERB is established] . . . to advise the Board of Supervisors, the Sheriff and the Chief Probation Officer on matters related to the handling of citizen complaints which charge peace officers and custodial officers employed by the County in the Sheriff's Department or the Probation Department with misconduct arising out of the performance of their duties. [CLERB] is also established to receive and investigate specified citizen complaints and investigate deaths arising out of or in connection with activities of peace officers . . . ." (S.D. Co. Admin. Code, § 340.)

CLERB makes (1) findings of misconduct and recommendations for imposition of discipline against individual deputies and also (2) recommendations for changes in policies and procedures of the Sheriff's Department. (S.D. Co. Admin. Code, § 340.9, subds. (c) & (f).) However, "[i]t is the purpose and intent of the Board of Supervisors in constituting [CLERB] that [CLERB] will be advisory only and shall not have any authority to manage or operate the

Sheriff's Department or the Probation Department or direct the activities of any County officers or employees in the Sheriff's Department . . . . [CLERB] shall not decide policies or impose discipline against officers or employees of the County in the Sheriff's Department or the Probation Department." (S.D. Co. Admin. Code, § 340.)

CLERB consists of 11 review board members and a small staff including an executive officer and a special investigator. (S.D. Co. Admin. Code, § 340.2; CLERB Rules & Regs.,[1] §§ 3.1 & 3.9.) CLERB's review board members are County residents appointed by the board of supervisors. (S.D. Co. Admin. Code, § 340.3.) They serve three-year terms, and may not be appointed for more than two consecutive terms. (S.D. Co. Admin. Code, § 340.4.) CLERB's review board members are not compensated, serve at the pleasure of the board of supervisors, and may be removed at any time. (S.D. Co. Admin. Code, §§ 340.5, 340.8.)

2. *CLERB Procedures for Investigating and Making Findings on Citizen Complaints*

The County administrative code authorizes CLERB to prepare and adopt rules and regulations for the conduct of its business, subject to approval by the board of supervisors. (S.D. Co. Admin. Code, § 340.7, subd. (b).)

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[1] All references to CLERB Rules and Regulations are to those adopted on March 9, 1992, as revised in April 1994.

These rules and regulations provide for processing and investigating citizen complaints. CLERB transmits copies of all citizen complaints received to the Sheriff or Chief Probation Officer, as appropriate. (CLERB Rules & Regs., § 9.1.) CLERB's executive officer and staff initially screen the complaints, classifying them as appropriate for investigation, deferral, or summary dismissal. (CLERB Rules & Regs., § 9.2(a).) CLERB's entire review board must review and approve the classification before "significant further action" is taken on any complaint. (CLERB Rules & Regs., § 9.2(b).)

In cases where a complaint is approved as appropriate for investigation, CLERB's investigator typically: (1) interviews the complainant, the aggrieved party, each subject officer, and witnesses; (2) examines the scene of the incident; and (3) views and analyzes physical evidence associated with the incident. (CLERB Rules & Regs., § 9.3(a).) The investigator attempts to secure written statements under oath from all participants and witnesses to the alleged incident. (CLERB Rules & Regs., § 9.3(c).)

The investigator prepares a written report, which includes a summary of the investigation along with the information and evidence disclosed by the investigation. (CLERB Rules & Regs., § 9.4.) The report also contains a procedural recommendation by the executive officer to the review board as to whether the case is appropriate for disposition at that time or should be referred

to a three-member panel for an investigative hearing. (CLERB Rules & Regs., § 9.4.)

The investigative report is submitted to CLERB's chairperson, who may attach his or her own recommendation. (CLERB Rules & Regs., § 9.4.) The report is then submitted to the entire CLERB board. (CLERB Rules & Regs., § 9.4.) The chairperson provides the complainants, aggrieved party, and each subject officer with: (1) written notice that the complaint will be considered by CLERB; (2) any recommendations on summary disposition or procedural matters; (3) a copy of the investigative report and summary, along with notification that all statements, records, reports, exhibits, and other file evidence are available on request, except where disclosure is prohibited by law; (4) written notice the parties may consult an attorney if desired who may represent them at any hearings; and (5) a copy of CLERB Rules and Regulations. (CLERB Rules & Regs., § 9.8.)

The complainant, subject officer, CLERB's executive officer, or any member of CLERB's 11-member board may request an investigative hearing for some or all of the allegations of the complaint. (CLERB Rules & Regs., § 10.1.) However, CLERB Rules and Regulations make no provision as to the effect of such a request.

CLERB's entire review board decides whether (1) an investigative hearing should be held, or (2) the entire review

board should review and determine the complaint based on the investigative report and the evidence in the investigative file without a hearing. (CLERB Rules & Regs., § 9.5.) An investigative hearing may be deemed necessary where: (1) there has been an undue lapse of time since the incident; (2) there is additional evidence not disclosed by the investigative report; (3) there is reason to question the findings and conclusion of the investigative report; (4) a hearing would advance public confidence in CLERB's citizen complaint process; or (5) personal appearance by the parties would facilitate CLERB's fact-finding process. (CLERB Rules & Regs., § 10.2.)

In cases where the CLERB board decides to review and determine a citizen complaint based on the investigative report and file evidence *without* an investigative hearing, the entire CLERB board deliberates and prepares a final report which contains findings of fact and overall conclusions as to each allegation of misconduct. (CLERB Rules & Regs., §§ 9.6, 16.6.) If CLERB determines the allegations are proven by a preponderance of the evidence, it sustains findings of misconduct against the subject officer. (CLERB Rules & Regs., §§ 9.6, 14.9.)

The final report adopted by CLERB is forwarded to the board of supervisors, the sheriff or chief probation officer, the complainants, and each subject officer. (CLERB Rules & Regs., § 16.8.) The complainants or subject officers may request the final report be re-opened and reconsidered by CLERB if previously

unknown evidence is discovered that was not available to CLERB and there is a "reasonable likelihood" the new evidence will alter the final report's findings and conclusions. (CLERB Rules & Regs.; § 16.9.) Additionally, the board of supervisors or CLERB itself upon its own initiative may re-open a final report when reconsideration is in the public interest. (CLERB Rules & Regs., § 16.9.)

3. CLERB's Reports Against Deputies

Here CLERB sustained findings of misconduct against each of the four appellants arising from three separate incidents. CLERB's findings were based on investigative reports; no hearings were conducted.

On May 9, 1995, CLERB issued its report concerning allegations of misconduct against five officers arising from the February 1992 shooting of Paul Reynolds by Deputy Jeffrey Jackson.[2] CLERB sustained an allegation of misconduct against Deputy Caloca, finding he "committed an act of misconduct when he improperly investigated the Reynolds homicide by asking Deputy Jackson leading questions . . . ." CLERB found Deputy Caloca asked Deputy Jackson questions that suggested answers creating the legal foundation for justifiable use of force.

On December 12, 1995, CLERB issued its report concerning the December 1991 shooting death of Esquiel Tinajero-Vasquez

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[2] Of those five, only Deputy Caloca is a party to this proceeding.

(Tinajero) by Deputy Smith and the investigation of the incident by Deputy Simica. CLERB sustained two findings of misconduct against Deputy Smith, finding (1) his attempt to stop and detain Tinajero was without reasonable cause or legal authority and (2) his use of lethal force was excessive. CLERB sustained one finding of misconduct against Deputy Simica, finding his narrative description, diagram, and report of the crime scene were misleading and incomplete.

On May 14, 1996, CLERB issued its report concerning the October 1994 detention of Robert Thompson and Dennis Webb by California Fish and Game Officer Lieutenant Turner, which occurred in Deputy Cuevas's presence. CLERB sustained three findings of misconduct: (1) Deputy Cuevas acted in a manner inconsistent with the Sheriff's Department's mission and ethics by refusing to prevent Lieutenant Turner from conducting an illegal detainment of Thompson and Webb; (2) Deputy Cuevas failed to safeguard Thompson;[3] and (3) Deputy Cuevas's report contained false or misleading information.

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[3] Thompson alleged he was ordered by Lieutenant Turner to remove his clothes and then stand in his underwear and socks for more than an hour outside a mountain campground in October. Thompson felt the effects of elevation and low temperature, and was visibly shaking; moreover, there were civilians present and Thompson felt embarrassed. Thompson had no other clothing, but the officers left him after nightfall at a 3,700-foot elevation dressed only in a tee shirt, underwear, and socks. Deputy Cuevas has denied the allegations.

In its reports against Deputies, CLERB made general recommendations for policy changes to the Sheriff's Department.[4] Although CLERB sustained findings of serious misconduct against Deputies, the final reports were silent as to recommendations of discipline. CLERB's reports indicate none of the Deputies responded to its investigator's request for a statement or interview.[5]

The San Diego Sheriff's Department investigated the same incidents giving rise to CLERB's reports, and found no misconduct by any of the Deputies.

4. Proceedings Subsequent to CLERB's Findings

In June 1996, counsel for Deputies wrote letters to the Civil Service Commission, requesting it hold liberty interest hearings or alternatively administrative appeals to allow Deputies an opportunity to challenge CLERB's findings. Civil Service Commission denied Deputies' requests.

Deputies and Sheriffs Association filed a petition in superior court seeking a writ of mandate to compel County and Civil Service Commission to conduct: (1) liberty interest

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4 In its report against Deputies Smith and Simica, CLERB recommended the district attorney's office reopen its investigation of Tinajero's death.

5 There is nothing in CLERB's reports suggesting any of the Deputies requested a hearing pursuant to CLERB Rules and Regulations, section 10.1, nor reconsideration of the final report pursuant to section 16.9.

hearings to allow Deputies to clear their names of CLERB's findings, or alternatively (2) administrative appeals pursuant to the Public Safety Officers Procedural Bill of Rights Act on the ground that CLERB's findings of misconduct constitute punitive action.

In support of their petition, Deputies submitted the declaration of Assistant Sheriff Thomas Zoll, who is in charge of the Human Resource Service Bureau for the Sheriff's Department. Zoll stated his department when considering a deputy for advancement "may consider findings and evaluations from other credible agencies or boards," including "credible reports or findings from such sources as . . . a citizens review board." Further, Zoll stated negative findings that a deputy committed an act of misconduct "published by a credible source . . . would be given consideration in personnel decisions, and may have an adverse impact on the career of the deputy . . . [e]ven though the [Sheriff's] department may have investigated the matter and reached a different conclusion . . . ."

The trial court denied Deputies' petition, finding (1) Deputies are not entitled to liberty interest hearings as they failed to show a present deprivation of liberty interests, and (2) Deputies are not entitled to administrative appeals as they failed to show punitive action.

DISCUSSION

"In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]" (*Saathoff* v. *City of San Diego* (1995) 35 Cal.App.4th 697, 700.) The facts in this case, insofar as they concern the effect of CLERB's findings against Deputies, are undisputed.[6]

I. *Liberty Interest Hearings*

Deputies contend CLERB's findings of serious misconduct have caused them to suffer harm amounting to a deprivation of their Fourteenth Amendment liberty interests in their respective careers. Deputies allege CLERB's findings deprive them from "moving and advancing within the law enforcement profession." Therefore, Deputies claim entitlement to liberty interest hearings to clear their names.

"'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing

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6 Respondents submitted no evidence which either contradicts or opposes Zoll's declaration.

is paramount.' [Citation.] Thus application of this principle requires a two-step analysis[:] 'We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, we must then decide what procedures constitute "due process of law."' [Citation.]" (*Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 307 (*Murden*).)

We have previously observed "[i]t is well established '[a] person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citation.] Rather, the liberty interest is infringed only when the defamation is *made in connection with the loss of a government benefit, such as . . . employment*. [Citations.]'" (*Haight* v. *City of San Diego* (1991) 228 Cal.App.3d 413, 418, italics added, quoting *Murden, supra,* 160 Cal.App.3d at p. 308.)

Even serious damage to reputation alone is insufficient to constitute deprivation of a constitutionally protected liberty or property interest -- the action by the government agency must be made in connection with or result in harm to a government benefit. (See, e.g., *Paul* v. *Davis* (1976) 424 U.S. 693, 701, 709-710 [police chief's distribution of flyer listing an individual as "active shoplifter" not a deprivation of liberty or property interest because *damage to reputation alone not*

sufficient to support a claim based on loss of constitutionally protected interest]; *Siegert* v. *Gilley* (1991) 500 U.S. 226, 232-233 [allegedly defamatory statements made by individual's former government employer, *not incident to the individual's termination* from former employer but resulting in loss of a subsequent position with a different employer, insufficient to state a claim for loss of liberty interest against former employer]).

Deputies do not claim, nor is there any evidence in the record on appeal of actual and present impairment to Deputies' positions with the Sheriff's Department -- e.g., there is no claim of demotion, termination, or reduction in salary. Moreover, Deputies admit that the Sheriff's Department investigated Deputies for the same incidents which concerned CLERB's reports and found no misconduct or violation of any Sheriff's Department rules by Deputies.

Instead, Deputies contend CLERB's findings of misconduct deprive them of their liberty interest in "moving and advancing within the law enforcement profession." Deputies argue CLERB's findings "effectively preclude [Deputies] from advancing within the ranks of their current employer, the San Diego County Sheriff's Department, and from gaining employment with other law enforcement agencies."

In support of Deputies' petition for writ of mandate and their contention CLERB's findings effectively "handcuff" them into their current positions, Deputies relied exclusively on the

Zoll declaration. As noted, Zoll declared the Sheriff's Department when making personnel decisions would consider reports by credible sources including citizen-complaint boards, and in cases where a credible source has found misconduct by officers similar to that found by CLERB against Deputies, such findings "may have an adverse impact" on Deputies' careers. Zoll did not state that the Sheriff's Department or any other potential employer has considered CLERB's reports in making personnel decisions or that CLERB's reports have caused present loss or harm to Deputies' positions.

Deputies' assertion that CLERB's findings would effectively lock them into their current positions at most amounts to allegations and evidence of damage to Deputies' professional reputations, which may result in *future* harm such as denial of a promotion. However, damage to reputation alone, even business or professional reputation, is insufficient to show deprivation of a constitutionally protected liberty or property interest. (See *Higginbotham* v. *King* (1997) 54 Cal.App.4th 1040, 1046-1047 [allegedly defamatory statement by a narcotics officer that a surgeon had been cultivating marijuana thereby damaging surgeon's *business reputation and medical practice not sufficient* to constitute deprivation of constitutionally protected liberty or property interests since a person's interest in his *reputation* is neither liberty or property for purposes of the Due Process Clause].)

Although it is clear CLERB's findings of serious misconduct stigmatize Deputies and may well impact their law enforcement careers in the future, we must focus on the absence of evidence in the record showing CLERB's allegedly false findings of misconduct were *made in connection with or have resulted in the loss* of a government benefit. The law requires there not only be government action but also the loss of a government benefit. (*Haight* v. *City of San Diego, supra*, 228 Cal.App.3d at p. 418; *Murden, supra*, 160 Cal.App.3d at p. 308.) Because the record on appeal contains no evidence of an actual loss of a government benefit suffered in connection with CLERB's report, the trial court correctly concluded Deputies were not entitled to liberty interest hearings.[7]

II. *Administrative Appeals*

Deputies assert there is undisputed evidence in the record on appeal showing CLERB's findings of misconduct against them constitute punitive action, thereby entitling them to administrative appeals pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). We agree.

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[7] Since Deputies have not shown deprivation of a protected liberty interest, we do not reach Deputies' contention CLERB's procedures for investigating and making findings on citizen complaints are inadequate and thus violate their due process rights.

"[T]he Public Safety Officers Procedural Bill of Rights Act provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. [Citation.]" (*Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1805, fn. omitted.)

One such basic protection is that the employing public entity must provide public safety officers the right to an administrative appeal of punitive actions.[8] "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by *any public agency* . . . without providing the public safety officer with an opportunity for administrative appeal." (Gov. Code, § 3304, subd. (b), italics added.) For purposes of the Public Safety Officers Procedural Bill of Rights Act, punitive action is "any action that *may lead to* dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (Gov. Code, § 3303, italics added.)[9]

Zoll, head of the Sheriff's Department Human Resource Services Bureau, opined the department's promotion process is

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[8] "Public safety officers" refers to peace officers, and there is no disagreement that Deputies fall within this category. (See *Howitt* v. *County of Imperial* (1989) 210 Cal.App.3d 312, 314, fn. 3.)

[9] The term "public agency" is not defined. The parties do not raise this issue nor do they suggest CLERB is not a "public agency."

extremely competitive, and a single blemish on a deputy's career can prevent him or her from advancing in the department. He also said a report published by a "credible source," sustaining findings of misconduct of a similar nature and severity as those CLERB made against Deputies, would be given consideration in personnel decisions and could have an "adverse impact" on an officer's career. Zoll added that even though the Sheriff's Department may have investigated an incident and reached a different conclusion, the existence of a credible report sustaining this type of misconduct would be considered.

Respondents presented no evidence in opposition to Zoll's declaration. They instead contended that Zoll's declaration does not show the CLERB findings will lead to a "punitive action" because Zoll does not specifically state that the particular CLERB reports at issue are "credible."

Respondents read Zoll's declaration too narrowly. Zoll states that Sheriff Department personnel decisions are made on the basis of the department's own findings and evaluations *and on evaluations of other credible agencies, such as a citizens review board*. Zoll further said that a report published by a credible source asserting the type of misconduct findings that were made against Deputies would be given consideration in personnel decisions and could have an adverse impact on this decision. From these statements, we must necessarily infer that the Sheriff's Department will consider the specific CLERB reports in

making personnel decisions pertaining to the Deputies and that this consideration may lead to an adverse personnel action as defined in Government Code section 3303.

Respondents maintain that the Sheriff's Department would not consider the CLERB reports because the reports contain conclusions inconsistent with the Department's own findings and conclusions. In asserting this argument, respondents fail to recognize CLERB's role in the local governmental structure and its mandated relationship with the Sheriff's Department.

The members of CLERB's review board are county officers (*Dibb* v. *County of San Diego* (1994) 8 Cal.4th 1200, pp. 1212-1213), appointed by the board of supervisors to serve three-year terms. (S.D. Co. Admin. Code, §§ 340.4-340.5.) "The members of the CLERB are delegated the duty to hold hearings, administer oaths and issue subpoenas, all in order to investigate, on behalf of the board of supervisors, complaints about the official conduct of employees of the county sheriff's and probation departments." (*Dibb* v. *County of San Diego, supra,* 8 Cal.4th at p. 1212.)

In light of these functions, it would be improper to conclude that a law enforcement agency will fail to consider reports by a citizens review board -- formed pursuant to a county charter amendment whose members are public officers appointed by and reporting to the board of supervisors. Although CLERB may reach conclusions different from the Sheriff's Department's

175 Cal.App.3d 423, 429; see also *Binkley* v. *City of Long Beach*, *supra*, 16 Cal.App.4th at pp. 1806-1807.)[10]

DISPOSITION

Judgment is reversed. The trial court is directed to issue a writ of mandate directing the Civil Service Commission to conduct an administrative hearing under Government Code section 3304, subdivision (b). Respondents to bear costs on appeal.

CERTIFIED FOR PUBLICATION

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P.J.

NARES, J.

10 The parties do not contest that the Civil Service Commission is the appropriate body to hear administrative appeals brought pursuant to Government Code section 3304, subdivision (b).

DECLARATION OF SERVICE

State of California
County of Sacramento

I am at all times herein mentioned, over the age of eighteen years, and not a party to nor interested in the within matter. I am employed by DMG-MAXIMUS, INC. My business address is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841, County of Sacramento, State of California.

That on the 6h day of August, 1999, I served the Comments to Draft Staff Analysis dated July 6, 1999 by Claimant, City of Sacramento, CMS 4499, Peace Officers Procedural Bill of Rights on the interested parties by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at Sacramento, California, addressed as set forth in the Attachment 1, attached hereto and incorporated herein by reference.

That I am readily familiar with the business practice of DMG-MAXIMUS, INC. for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United State mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 6th day of August, 1999 at Sacramento, California.

Declarant

ATTACHMENT 1

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DMAXIMUS
Helping Government Serve The People

September 28, 1999

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Re: Peace Officer's Bill of Rights
No. CSM 4499
Hearing on Statement of Decision

Dear Ms. Higashi:

At the request of the City of Sacramento, and Ms. Dee Contreras in particular, I am writing to request that the hearing on the Statement of Decision be continued until the Commission's November hearing date. Ms. Contreras telephoned me this morning to inform me that due to situations which had just arisen in her office, she will be unable to attend this Thursday's Commission meeting. She wishes to speak to the issue of the taping of interrogations and subsequent transcription as raised in the proposed Statement of Decision. She then inquired as to the date of October's meeting, and she informed me that she will be in Monterey all that day, doing a state-wide training. Accordingly, she has requested that this matter be continued until November's hearing date.

I apologize for the lateness of the request. However, as I will be out of the office tomorrow, I would appreciate your response today.

Thank you for your courtesy and cooperation.

Very truly yours,

Pamela A. Stone
Legal Counsel

cc: Dee Contreras

4320 Auburn Boulevard, Suite 2000 • Sacramento, CA 95841 • 916.485.8102 • FAX 916.485.0111

PUBLIC HEARING

COMMISSION ON STATE MANDATES

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CERTIFIED COPY

TIME: 9:45 a.m.
DATE: August 26, 1999
PLACE: State Capitol, Room 437
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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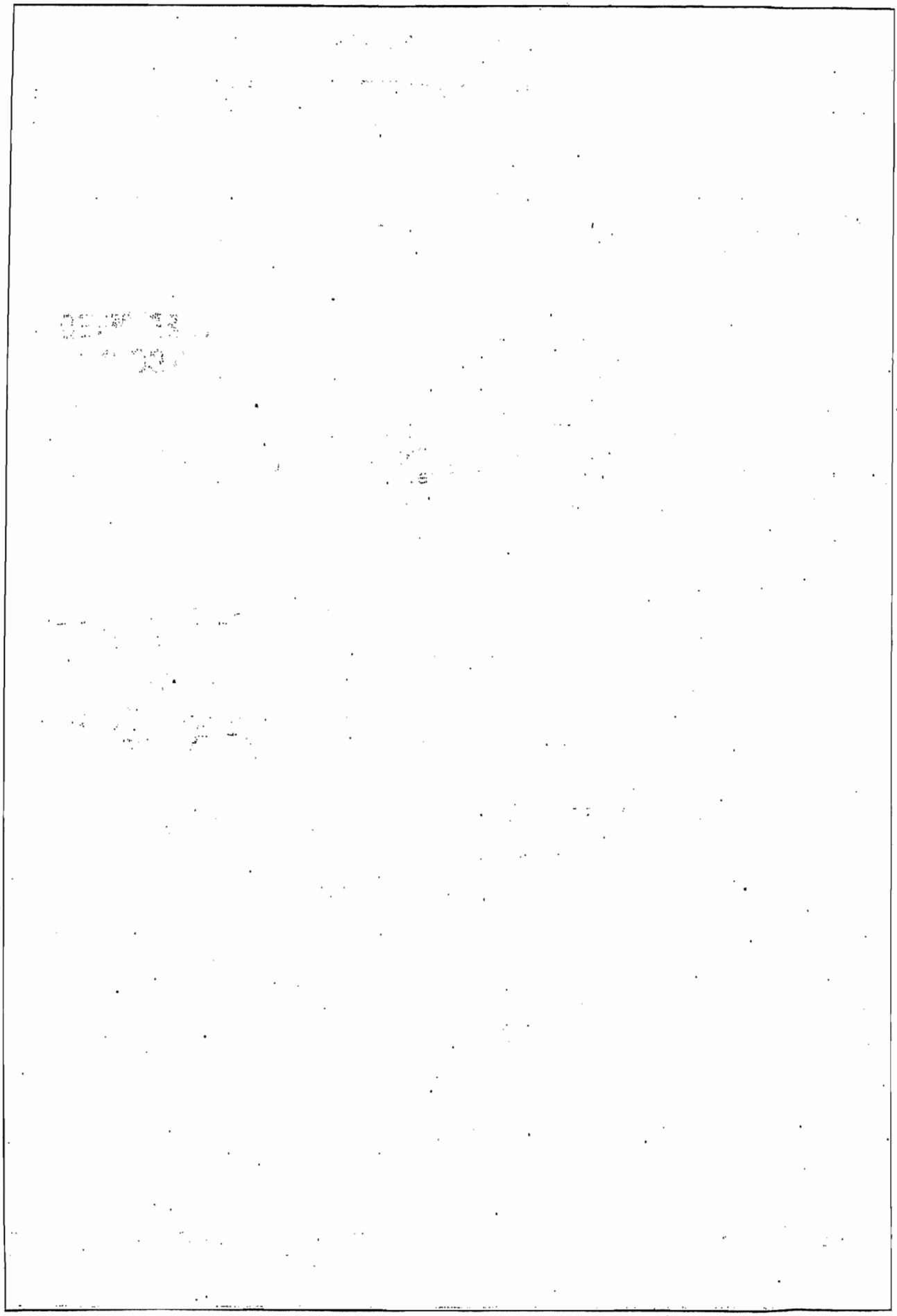
Reported By: STACEY L. HEFFERNAN CSR, RPR
No. 10750



A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNETTE PORINI, Chair
Representative for B. TIMOTHY GAGE, Director
State Department of Finance

ALBERT P. "AL" BELTRAMI
Public Member

MILLICENT GOMES
Representative for Loretta Lynch, Director
State Office of Planning and Research

D. MICHAEL FOULKES
Representative for KATHLEEN CONNELL
State Controller's Office
Deputy Controller, Legislation

BRUCE VAN HOUTEN
Representative for State Treasurer

JOANN STEINMEIER
Public Member

COMMISSION STAFF PRESENT

PAULA HIGASHI, Executive Director

PAT HART JORGENSEN, Chief Legal Counsel

CAMILLE SHELTON, Staff Counsel

PIPER RODRIAN, Staff Services Analyst

PUBLIC TESTIMONY

JAMES A. CUNNINGHAM, Legislative Mandate Specialist
San Diego City Schools, Education Center

CAROL A. BERG, Ph.D., Executive Vice President
School Services of California, Inc.

JAMES M. APPS, Principal Program Budget Analyst
State of California, Department of Finance

JOSEPH SHINSTOCK, Assistant Budget Analyst
State of California, Department of Finance

ALLAN BURDICK, CSAC, League of Cities' Advisory on State Mandates

A P P E A R A N C E S

PUBLIC TESTIMONY

ELIZABETH S. STEIN, Staff Counsel
State of California, State Personnel Board

MARCIA C. FAULKNER, Manager, Reimbursable Projects
Office of the Auditor/Controller-Recorder

DEE CONTRERAS, Director of Labor Relations
City of Sacramento, Office of Labor Relations

EDWARD J. TAKACH, Labor Relations Officer
City of Sacramento, Office of Labor Relations

PAMELA A. STONE, Senior Manager/Legal Counsel
DMG Maximus

LEONARD KAYE, Certified Public Accountant
County of Los Angeles

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AGENDA INDEX

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AGENDA INDEX

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All those in favor indicate with "aye."

(Affirmative Response by Several Commission Members.)

CHAIRPERSON PORINI: Opposed?

(No audible response.)

CHAIRPERSON PORINI: All right. That whittles down our agenda significantly.

MS. HIGASHI: This brings us to Item 2, which is the test claim hearing on the Peace Officers Procedural Bill of Rights.

Camille Shelton, of our staff, will present this item.

MS. SHELTON: Good morning.

This is a test claim filed by the City of Sacramento. The test claim legislation provides procedural protection to peace officers employed by local agencies and school districts when a peace officer is interrogated by the employer is facing punitive action or receives an adverse comment.

All parties agree that the test claim legislation imposes some of the notice and hearing protections to employees that are required by the due process clause of the United States and California Constitution.

The Commission has required staff to analyze this connection between a due process clause and a test claim legislation in order to determine that the activities required by the test claim legislation constituted a new program or a higher level of service and to determine whether those activities impose costs mandated by the state; however,

the parties dispute how far the due process clause goes and when the requirements of the test claim legislation kicks in.

The main issues in dispute are bulleted on pages A-2 and A-3 in the Executive Summary. Staff recommends that the Commission approve the test claim for the activities identified on pages A-3 through A-6 of the staff analysis.

Will the parties please state their names for the record.

MS. STONE: My name is Pamela Stone. I'm here on behalf of the City of Sacramento.

MS. CONTRERAS: Dee Contreras, Director of Labor Relations for the City of Sacramento.

MR. TAKACH: Edward Takach, T-a-k-a-c-h, Labor Relations Officer of the City of Sacramento.

MR. BURDICK: Allan Burdick on behalf of the California Cities' SB 90 Service.

MS. STEIN: I'm Elizabeth Stein. I'm staff counsel representing the State Personnel Board.

MR. SHINSTOCK: Joseph Shinstock representing the Department of Finance.

MR. APPS: Jim Apps with the Department of Finance.

CHAIRPERSON PORINI: All right.

Do we need to do any swearing in of our witnesses?

MS. HIGASHI: Yes, we do.

Will all of the witnesses please raise their right hand:

Do you solemnly swear or affirm that the testimony which you're about to give to the Commission is true and

correct based upon your personal knowledge, information or belief?

(Unanimous affirmative response by the witnesses.)

MS. HIGASHI: Thank you.

MS. STEIN: Good morning Madam Chairman, Members of the Commission. Our presentation is going to start with Ms. Dee Contreras, who is the Director of Labor Relations for the City of Sacramento; and we're all available here to answer any questions your Commission may have.

CHAIRPERSON PORINI: Thank you.

MS. CONTRERAS: By way of background, I've been involved with labor relations for the city for a little over nine years and I've been director for the past four. Before that, I was a labor relations representative, and I was the person assigned to the police department, so I was involved with police discipline matters and intimately involved with the activities that are involved with POBOR here.

And Ed is my senior staff, who is currently assigned to the police department, who has been dealing with them since I left and also has a background in law enforcement, having been a police officer himself in the past, so he is also familiar with and has been representing both employees and the management side, in terms of police departments, for in excess of ten years now.

The City of Sacramento is not a particularly large jurisdiction, as the state goes, but we do have a relatively active Internal Affairs Department, processing somewhere in the neighborhood of 80 cases a year and performing hundreds

of Internal Affairs' interviews a year. So the impact of this legislation, if it has any impact at all in the I.A. process, is substantial, when you start looking at that.

As a small department, we generally have three sergeants who are assigned to Internal Affairs. And we're talking about hundreds of interviews, so the impact on people and their jobs is substantial. And we actually implement 40 or more police disciplines a year.

We can have active years in which one complaint -- one complaint resulted in 67 disciplines related to that specific, single case. So when we say 80 cases, that doesn't mean 80 people are involved, it could be significantly more than that, who wind up being reviewed in the course of that process.

It's important to distinguish the things that are required by Skelly and due process, and we recognize that those things exist outside of the requirements of POBOR, but they first require a property interest in the job. The reason the public employer has those mandates and those requirements is because when public employment, when it is career or permanent or whatever the title the entity gives it, is given to people, it is presumed that a property right attaches to it and that employment will continue unless something serious happens. And then, because we are a public jurisdiction, we are required to give them due process in order to allow them to defend their property interest in their job.

By definition, that means employees with no property

interest don't have those rights. And, yet, POBOR mandates those rights, in terms of all sworn police officers. So all sworn peace officers is what the statute uses.

POBOR -- excuse me, Skelly and due process require a fact-finding investigation, always a good practice, notice and opportunity to the person who is being disciplined, if they are disciplined. There is no requirement to provide information to an employee who, as a result of an investigation, is not disciplined, but there are situations in which POBOR requires, in fact, that they be given information that would not otherwise be -- they would not otherwise be entitled to.

Skelly does not apply, as I said, to probationary and at-will employees, and it does not arise for reprimands or suspensions of short duration. The Skelly case itself involved a termination, but, as you know, decisions like that are reinterpreted by the courts regularly. And there are cases that indicate, for example, suspensions of five and possibly even 10 days do not require the same protections as does Skelly. So there's some question as to where those rights arise.

In the City of Sacramento, letters of reprimand do not require that we provide information to the employee. They don't get a Skelly package in the city. We don't issue an intent letter. In normal discipline, under Skelly, you issue an intent letter that says, "This is what we're going to do. You have a Skelly hearing, which is a review process, an informal review, prior to the implementation of final

discipline."

And, the city, we then issue a separate, final discipline letter that varies by jurisdiction. But, in the local entities, when you talk about what the impact this has on cities, counties, local jurisdictions, agencies, JPAs, Joint Powers Agencies/Administrations, those are all public entities, there are hundreds, perhaps thousands, of them in the State of California that are impacted by this, if they have peace officers working in those jurisdictions, as do most cities and counties.

As a practical matter, it doesn't apply for us, in terms of reprimands, absent POBOR, and POBOR creates some greater rights in those areas. There's no obligation, in a normal interview, to notify the person of what it is you're investigating. We can call in, and do, miscellaneous employees in the City of Sacramento and begin an investigation, a fact-finding process, without telling them what it is, what the complaint is, what it is we're looking for, what it is we're going after.

You can't do that with peace officers. You have to notify them what it is you're investigating, what the complaint is about. It becomes complicated, because, if you give them the name of the complainant, you create other problems as you go through this process.

So, as you can see, it's much more sensitive and creates a greater burden. It substantially increases the burdens on the local government, in terms of the right to know, the nature and area of the investigation. It also

hampers the investigative process, because, when you give a person information before that you get -- before you are allowed to interrogate them, it allows them an opportunity to create, reflect or refresh facts that might have come out differently in a straightforward investigation where they didn't know what it is you were looking for or at.

There's a limitation on the number of interrogators you can have with the employee at a given time, which can impact your investigation and can make a difference, in terms of the kinds of questioning that goes on.

They have a right to a transcript of a prior interview before there's an additional interview. That can -- if you are interviewing a large number of people and you reinterview the employee after you've interviewed intervening witnesses, that that means if you are taping you have to, in essence, re-transcribe the process. And I'll talk about taping a little bit more in a second.

They have a right of review for at-will employees. POBOR creates protections up to the level of the Chief of Police. I'm not sure that, when the Legislature did this, they intended to protect Chiefs of Police in the City of Sacramento.

Our current police chief, for example, who never worked as a civil service employee in the City, has no right, whatsoever, to return to any other classification and is an at-will employee. By that, in the normal context of law in the State of California, he can be released for any reason or no reason, as long as it's not an illegal reason, and that's

the end of his employment.

On the other hand, he has POBOR rights which gives him substantially greater rights than he would have as an at-will employee. In fact, in a major dispute with some employees who may, some day, be managers, their biggest concern is: They want a definition of an administrative review process that will be mandated for POBOR managers, should they become managers, because they know what their civil protections are.

And it's been an interesting struggle to try and deal with them on that issue, because this right is so sacrosanct with them, that they're not willing to give it up; and they see it as an integral part of their ongoing job rights. And we've tried to deal with that in a variety of ways, but the practical matter is: There is an impact of this statute, and the impact flows, in terms of what we're required to do.

There are impacts beyond discipline in that it affects transfers, whether or not there's a financial impact from the transfer. We have no such thing in the City as disciplinary transfers. They don't exist under the civil service rules; they don't exist in any other process.

But, if we discipline somebody and also transfer them from their assignment, we are now in a position where we are compelled to treat that as if it is discipline and to, in essence, give them some sort of a third-party neutral review of the transfer, the same as if it were a normal discipline.

In fact, in the latest incident of that, we treated

it as if it was part of the discipline process instead of separating them out, because the city attorney was very concerned that we would wind up in a situation where we would have quite a bit of litigation over what POBOR rights are. The law says "punitive transfers," but what's a punitive transfer is in the eye of the beholder.

I received this morning -- apparently, you've received a DPA case, which has no precedential value, by the way, at the local government level, that says that a transfer is in the eyes of the beholder, an employee -- if this is an issue of fact. Well, an issue of fact, where you have no process, means you have to litigate all those issues. That's a burden that is difficult for the employer, and, again, exists only because of this statute.

Employees often see operational moves as punitive. If they don't like the reorganization of the department, if they don't like going to neighborhood policing, if they believe going to neighborhood policing requires a 75-percent increase in the number of police officers in the city, as remarkably not our association did, then they don't see, when you do it, that it isn't punitive when you start assigning people. Those become struggles on a day-to-day basis that should not occur and do occur because of the impact of this.

Probationary employees have a review right that goes beyond a liberty interest. A liberty interest arises when the employer releases somebody on probation for reasons that basically impugn, in a significant way, their character such that they would have difficulty getting another job. If

I released you for dishonesty or theft, for example, that would apply.

In the City, we don't ever release anybody for any stated reason. We have a letter which says, "You're being released because you failed to meet the requirements of the position during the probationary period. Thank you very much. Have a happy life. Love, Dee." That's basically what the letter says. And the unions regularly object to it.

As I said at the beginning of this, we have very strong language in our city charter regarding our rights during probation, and we don't intend to, in any way, reduce them; however, we regularly have a review of probationary officers who fail as police officers. And probably, based on recollection, 80 or 90 percent of them actually come through and request a review and discussion of the basis for it, and they go over all the documents that were in their file.

It creates an obligation for us to document and justify our decision-making process during probation, which is unnecessary, and, in fact, is in conflict with the concept of probation, to have to defend that decision at the end of the line, particularly given the kind of language we have in our charter.

The right to tape creates an obligation on the agency to, in fact, tape interviews. And I know that it can be argued that it doesn't; however, let me try and articulate the problem you face, in reality, as a local jurisdiction.

In the State of California, you don't have the right to tape somebody without their permission. So, in essence,

with every employee, except sworn peace officers, we can say, "No, you can't tape this interview. Take notes." And we take notes and they take notes. And -- or we can tape and they don't have to have a copy of it, but, if we transcribe it and do discipline, certainly we would give them that copy, but we take notes and they take notes.

If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do not have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective.

If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have.

So it is essentially -- it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape. And, if we tape, we, then, if we're going to reinterview, transcribe.

In the case that I discussed earlier, which everybody agrees is an anomaly, one complaint we had -- 200?

MR. TAKACH: 240.

MS. CONTRERAS: 240 people were interviewed in the course of one investigation and 67 disciplines flowed from it. You can imagine the complication of going back and

reinterviewing people when you have 240 sets of transcripts to transcribe in order to get information you needed before you could reinterview those people as they went.

Some people who were intimately involved in the problem, in that particular case, you only had to give them their transcript at that point in time, but, in order to ask questions about other people's transcripts or questions or statements, and to be clear and specific and fair to the employee, you basically had to do that. We had transcribers basically running 24 hours a day trying to keep up with the taping process in that interviewing parade that came out of that one complaint.

So it's not that we can tape or we choose to tape. I think anybody who's ever presented a case in front of an arbitrator would acknowledge that we must tape if the employee does. Otherwise, we go to a hearing with a record that is inferior to the record that the employee has.

In the local government, POBOR also requires a right to respond to adverse documents. And, while that sounds simple, it creates an obligation to process, file and maintain those responses and attach them to the correct document and make sure they get into the file. Generally, it also requires some administrate review and to discuss the response of the employee.

I have seen responses to documents in which the employee wrote pages and pages and pages of information and/or questions. And so it requires a substantial amount of time to respond to that. That doesn't exist anywhere except

here.

Reprimands in the City are the most common form of discipline. They are probably 25 to 35 percent of what we do in any given year. The fact that we have to provide an administrator to review for those is an additional burden. The fact that we have to maintain the kinds of recordkeeping that are involved in presenting that information is a substantially greater burden than what we have otherwise.

We realize that there are a variety of impacts on local government that are raised by the discipline process as it exists without POBOR. And you have to do, for example, what's compelled, in terms of your own rules, and that varies from organizations.

As I said, we don't have disciplinary transfers. I'm sure there are many jurisdictions where the Civil Service Rules includes those things. You know, reprimands used to be covered by the Civil Service Rules in the City of Sacramento. They were negotiated out, in terms of dealing with the union, so that they don't -- are no longer covered by it.

In many jurisdictions that I've dealt with in the past, reprimands are not considered formal discipline, at all, even written reprimands. Those are activities that the local entity is allowed and should be allowed to decide. And the impact of this legislation is that we are required to provide additional rights to people, and that necessitates -- of necessity impacts staff, time, documentation and recordkeeping for all of those things.

So to the extent that the staff recommendation

acknowledges the additional burden placed on local government, by that, we would concur. I still have concerns that the at-will peace is not recognized in its totality, because, again, our police chief is a good example.

Our Civil Service Rules give every other police manager in the city -- in fact, if we were going to terminate them, the right to revert to the bargaining unit, they basically leave their exempt employment, go back to their last civil service status and then we fire them. So it's kind of a two-step process.

Under the Civil Service Rules, they carry some sort of historical perspective, and that's true of all employees. I've never worked at the city as a civil service employee, so I don't have that protection. Somebody in my position who did, who came up through the ranks that had been in civil service previously, would, in fact, be able to revert back and have a hearing at that point.

But, in fact, they are all at-will employees. And, short of termination, they have, under our system, no right to appeal a discipline or to respond or to address discipline because they have no property interest in their management jobs. And, yet, POBOR gives them that.

So I add that as an additional concern beyond the staff recommendation. But we appreciate very much the work that the staff did, in the fact that they waded through what is, what I think, very arcane, difficult law that only somebody who has to deal with every day can appreciate, found that, in fact, the burden on cities, counties, and school

districts is substantial and does exist such that it's a mandate from the State.

Thank you very much.

CHAIRPERSON PORINI: All right. Questions?

Next witness.

MR. TAKACH: No, not yet.

CHAIRPERSON PORINI: All right. Then should we go with the Department?

MS. STEIN: I just have a few brief comments. I'm Elizabeth Stein representing the State Personnel Board. We addressed our comments in the letter to the staff. I'm just going to address a few things.

First, as far as the City of Sacramento's comments to the staff, we believe that written reprimands are entitled to due process protections, that the state laws give those protections to people who receive written reprimands, mostly because of the Stanton case, Stanton v. State Personnel Board; and staff addressed that case.

And, in that case, there is clear language that due process protections -- that due process rights are covered by POBOR and that POBOR is consummate with the due process protections. And staff cites that case, and we agree with staff's analysis.

As far as the tape recordings, as a practical matter I can see the problems that local governments have, having to provide tape recordings for those interrogations, but I think, as a matter of law, if it was litigated, they would probably lose on that issue, because, as staff also points

out in their analysis, the case law says that if it's not a mandated activity, something that local government may do, that they are not entitled to reimbursement.

As far as things that we brought up in our letter, the State Personnel Board, there's only two things, at this point, I'd address. One is: I understand that the Commission just looks at the legislation, POBOR, as it existed when the test claim came up, but I think it's inherently wrong if you don't recognize the amendment to the statute.

Courts, as a matter of course, will take judicial notice of changes in the laws. And, right now, as of December '98, there is no mandate by the State, under POBOR, to give these appeal process rights to probationary -- to people who have not passed probation, permanent employees; and to not recognize that, I think, would be wrong. It'll come out at some point, I would imagine, if the test claim is either amended, but it just seems that the Commission should be able to recognize that and provide that the State is no longer required to provide reimbursement for probationary employees after December '98 when it was amended.

The other concern would be: If you go back and you try and sort out which probationary employees who've been disciplined have been disciplined for things involving liberty rights, who's going to make that determination? It's usually a determination made by courts and judges.

So, if you go back and seek reimbursement for an appeal process that a probationary employee enjoyed because

of POBOR, you'd have to look at whether or not a liberty interest was involved, because this is something stigmatizing a reputation, because those people who are fired because of something that will stigmatize their reputation are still, as a matter of due process, entitled to an appeal process. So that's just another thing I think the staff should -- the Commission should look at when dealing with that issue.

As far as the disciplinary transfer cases, I don't think the law is as clear as the City contends. There are many jurisdictions. The State, all the time, has cases of transfers that are clearly designated as disciplinary. And, in those cases, the State does provide for due process protections.

And we think the Runyon case and the Howell case cited by the staff in their analysis are not clear, saying that disciplinary transfers -- people that are transferred for disciplinary reasons are not entitled to due process rights. We think that there's a real question that, perhaps, they are. And the State has recognized that in its own precedential decisions.

That's all I have right now.

CHAIRPERSON PORINI: Questions? Department of Finance, do you --

MR. APPS: No. We have nothing, really, to add at this point.

CHAIRPERSON PORINI: All right.

MS. STEINMEIER: I do have something. I would like to ask staff to address, particularly, the last comment by

Mrs. Stein about the due process rights, particularly as they relate to transfers.

Do we have something in the analysis or would you like to --

MS. SHELTON: We've addressed that on page A-11, in the second and third paragraphs. Basically, it's in your binder or -- I don't think it's going to be in the blue volume.

MR. BURDICK: Okay.

MS. SHELTON: We found two cases dealing with -- discussing transfers. One was the Runyon case. And, in that case, the peace officer did receive a transfer plus an accompanying reduction in pay. And, in that case, the court did find that the officer was entitled to due process protection.

We could not find any cases where the officer was just transferred alone, without any accompanying reduction in pay or reduction of classification, or anything like that. There was always something tied to the transfer.

The one, as Ms. Stein pointed out, we did find was that Howell case. And, in that Howell case, the court does state that: "An employee enjoys no right to continuation in a particular job assignment." So, from that language, we interpreted that an employee, a permanent employee, does not have due process rights for a pure transfer; and that POBOR, in that case, would go beyond and constitute a new program, if it's just a pure transfer.

CHAIRPERSON PORINI: Any other response?

MS. STEIN: My response to that would be that Runyon did involve the reduction in pay, in addition, but it's our opinion that the disciplinary transfer, itself, is certainly as harsh as a written reprimand, which is entitled to due process, that staff acknowledges. And if -- the court didn't say that -- it was just silent, as to the issue of a disciplinary transfer alone.

As far as Howell, it dealt with the issue of a good cause for a late filing. And they never made the determination that the transfer was, in fact, disciplinary in nature. It was going back to the lower court to figure that out, so I do not think that the case law prohibits due process rights for a disciplinary transfer.

The State has recognized those rights for its employees and believes that -- it's still an open question. I think if a court was to address it, that the court would come down on the side of giving due process protection to those people, because it's discipline in nature. It's certainly as harmful to one's reputation in the file as a written reprimand, which does provide for due process protections.

CHAIRPERSON PORINI: All right. Mr. Beltrami?

MR. BELTRAMI: Ms. Stein, how would you respond to the point that was made in the instance of the Chief of Police, for instance?

MS. STEIN: Well, I suppose it depends on the -- the Chief of Police, if they're a permanent employee, is entitled to the same due process protection.

MR. BELTRAMI: Well, he's an at-will employee. He works for the County. Council should have the right to terminate without any reason, at all.

MS. STEIN: Well, we did not address that issue, and, so, in the State, there's been a court case that CEAs, which are sort of the state equivalent, the Career Executive Assignments, do not enjoy due process rights.

MR. BELTRAMI: We're familiar with that.

MS. STEIN: I'm sure you are.

So we would concede, probably, that they don't enjoy that, at least the Personnel Board, because that has been litigated on a state issue, on a similar sort of issue.

MR. BELTRAMI: Ms. Contreras, I thought that the Personnel Board made an interesting argument, and, that is, that this is really good for you because it tightens up things so well, and, therefore, it's going to save you money in the long run rather than cost you money.

Would you comment on that?

MS. CONTRERAS: We were discussing that issue in the hallway. It's funny you should ask. And I said that, "To the extent anybody thinks that this law, in particular, or that legislation, in general, creates harmony and improves processes, they are naive in the extreme."

In fact, the amount of hostility and fighting that goes on about issues like whether or not you can transfer people, whether or not you have the right number of people in an interview room, whether or not you get transcripts soon enough, we're having a struggle right now in the City of

Sacramento.

The initial contact process with Internal Affairs is what we call the blue sheet. It's mimeoed on blue paper. You know what the complaint is, who the officer is, who it involves, what the substance of the complaint is. And it used to be a way of introducing the employee to the investigation.

When they came in, we basically gave them the blue sheet. We showed it to them. They couldn't take it or copy it or anything, but they could look at. And then we got into fights with counsel for the employees about whether or not the blue sheet said what the questions they were asking related to, or, "Who was the person who filled it out? Well, who wrote that? Who filled that out? There's two handwritings on this piece of paper." So we stopped showing them the blue sheet.

And now we're in the middle of what will -- what could very well wind up in arbitration, the issue of whether we changed our practice by now reading the blue sheet to them but not showing it to them so they don't get to see the handwriting. That blue sheet exists because of POBOR. I mean, we struggled continuously about whether the employees' perception of whether they are getting all the rights that they're entitled to, to say nothing of the fact that the law itself has continued to expand.

At one point, what was required was some sort of administrative review of the process. Now, our unions believe that everything we do is subject to third-party

neutral review. We have to arbitrate everything. They want to take it through civil service or to an outside binding arbitration process or to court. So, no, it hasn't created good will or a tighter process or help the relationship in any way.

I think legislation rarely does that. But, in this case, it has served to do exactly the opposite. It is a weapon used by employees and their union against the employer, and it's a continuous threat, in terms of whether or not we're going to comply. We rarely -- I'll be honest with you, we rarely are threatened by it; and we have been in court more than once with employees who've decided that they didn't like the way we were doing business and they were going to take us to court. And, typically, we prevail because we do what is required of us, but, no, it hasn't helped the process. Thank you.

Thank you for asking.

MS. STEINMEIER: I have a comment.

CHAIRPERSON PORINI: Yes, Ms. Steinmeier.

MS. STEINMEIER: There are some parallels between peace officers and teachers that I'm hearing through your -- school districts have this problem with teachers, so I understand. And I know the laws were designed to protect, and sometimes maybe overprotect, and I do appreciate the staff analysis. It does not create a happy situation. In fact, it creates a contentious situation. And I have empathy for that. So I do agree with most of the staff analysis.

On the question of taping, we have a standard, here,

about reasonableness. Even if the law says "may," if it's almost required by the nature of doing business in this case, if the employee tapes, the employer must. I mean, you can't end up not having your own record, so I would be inclined to agree with the claimant on the taping issue.

The other one on written reprimand is not as clear to me. I guess I buy the argument that it is a due process. Anytime you put something in someone's personnel file that is negative about them, regardless of state law, I think that the constitution does imply, if not actually require you, to allow them to know what it is and to respond to it, if they want to. So I don't see the first one as being -- the one on written reprimand as being something that flows from the state law. I think it flows from the Federal Constitution.

But, on taping, I don't know how the rest of you feel, but I'm compelled to believe that it's a requirement, even if the law says "may."

MS. STONE: Madam Chairman, I'd like to address the -- this is on the issue of written reprimands. When you're addressing the issue of written reprimands, you have to take a look at what's required under POBOR and compare that with what is required when you're not dealing with a peace officer employee.

In my prior incarnation, I was responsible for disciplining both miscellaneous that were civil service, as well as attorneys that were at-will, and it was like herding cats. I don't know how else to explain it. When you're

issuing the written reprimand, there is no requirement that the individual be given the right to respond or make any comments to it, at law.

In fact, the Stanton case, I'd like to -- in your materials at page 311, it goes through and does an analysis. And I know that Ms. Shelton disagreed with me and that's fine. It goes through and does an analysis of what is required for written reprimands under POBOR.

First from the standpoint of procedural due process, and, in this particular matter, if you'll notice on page 311, it's about the fourth paragraph down on the left-hand side, the court says: "As the city notes, no authority supports plaintiffs,'" that would be the employees, "underlying assertion that the issuance of written reprimand triggers due process. Said parts outlined in Skelly."

And it goes on and says here, "Skelly applies in all these certain situations." And, on the bottom, it says, "We find no authority mandating adherence to Skelly when a written reprimand is issued." And then it goes on to say, "By the way, you've got protections for written reprimands under POBOR," and that it went through and did an analysis to ascertain whether, in this instance, the administrative procedures, under POBOR, were sufficient for a written reprimand. So it's very clear to us, and, in no other circumstance, does a written reprimand rise to the level of the Skelly. It is only with POBOR that the individual employee has a right and ability to comment.

I note that the State Personnel Board has made other

mentions about what their particular practices are; however, what the State has voluntarily chosen to do with respect to its employees is separate and apart from what the constitution requires, because that's what we're looking at, so that's our concern with respect to written reprimands.

If this particular Skelly-type requirement would be imposed on every miscellaneous employee, it -- or nonsafety members, the amount of work that would be required would be phenomenal. Then, for example, Skelly does not necessarily cover suspensions of less than five days. Well, if it doesn't cover a suspension of less than five days, a written reprimand, which is much less on the hierarchy of discipline, should also not be covered.

CHAIRPERSON PORINI: Other questions? Mr. Foulkes.

MR. FOULKES: I don't know if this is for staff or for the folks from Sacramento, but the issue of written reprimand versus, as in the staff recommendation, "adverse comment," and what is the difference between those and how does that play into this? Because we had some concerns in reviewing that. Perhaps, the word choice was --

MS. SHELTON: That's a good point. We discussed that amongst staff, too. The language in the statute says "adverse comment" and it doesn't tie it back to a written reprimand. But I would imagine in practice, and maybe Ms. Contreras can address your question a lot better than I can, that there are times when an adverse comment equates to a written reprimand. I would imagine that to be true. You might ask the parties about that.

And that's why we clarified in the staff analysis, that, even in those cases where it does, if it does equate to a written reprimand, we found that with written reprimands due process would actually apply. So, in those cases, you would have a limited -- the activities would be -- the reimbursable activities would be limited to just the two.

CHAIRPERSON PORINI: Comment?

MR. TAKACH: Yes. The City of Sacramento, the Police Department, issues something lower than a written reprimand called a documented counseling, which remains in an officer's file generally for a -- it's called a watch file, generally for a period of a year until they move to another assignment.

We believe that there's a right to respond to that comment under the law. Now, written reprimand is above that, which remains in their file through our own practices as formal discipline; but they have the right to respond, even to that adverse document, which is a documented counseling of you spent too much time at a coffee break. I mean, it can be that simple. They get the right to respond to it because it's in their file.

MS. CONTRERAS: Let me play on that. Watch file means shift file not watch this person's file. For those of you who are not familiar with police terms, there were three watches and that means shifts, so the watch file is not a warning file about a bad person; it is basically the supervisor's working file, typically, is what a watch file amounts to. It doesn't become part of their permanent

personnel file. In fact, they're purged regularly.

MR. TAKACH: We have one challenge under POBOR that an adverse comment -- which was a complaint by either a departmental employee or a citizen which generated an Internal Affairs' complaint which did not result in discipline. There was a transfer but was rescinded, so there was no adverse action taken to the employee, other than there was this complaint in an Internal Affairs' file, not his personnel file, as stated in other pieces of statute. But there was -- the challenge to that, just being in the Internal Affairs' file, to want to get that out or to respond to that.

MS. CONTRERAS: Let me comment on that. That case went to court; and the union's perspective was that he had a right to -- what the employee sought was the complaining document which was written by a superior officer. And in what, from our prospective, amounted to a personal angry response to the person who filed the document, since no discipline was forthcoming. He believed that it was done, you know, on an individual, personal basis maliciously, and so we wound up in court on that case.

Now, the judge chose -- did not issue a TRO, chose not to -- basically told the parties that they should go settle this, because there is no case law that extends where they were going. But, again, based on the language of POBOR, under a normal circumstance, that would have been a, "Yeah, right. So what?" kind of response, but we wound up in front of a judge.

We settled the case reading onto the record a settlement proposal we tried to make, but that settlement basically reinstated some of the employee's rights because there was no subsequent investigation -- I mean, no discipline out of the investigation. We would have gone there anyway, but we had to resolve it in court rather than doing it in the normal course of events because of POBOR. Their belief that that complaint -- not anything that was ever in his personnel file, the fact that somebody had complained about him, we investigated it and took no action based on it, was sufficient to generate POBOR, right to review under the documents.

MS. STONE: Madam Chairman, there's also some materials in the response to the draft staff analysis that talk about how, if there is citizen review boards that do an investigation and come up with findings that do not necessarily lead to discipline, the courts have found that those findings of citizen review boards, in jurisdictions which have them, can constitute an adverse comment even though there is no discipline intended by it, and, therefore, the officer is entitled to respond to these particular filings which just exist and are not necessarily included in their personnel file.

CHAIRPERSON PORINI: All right.

Ms. Stein?

MS. STEIN: Yes. I just wanted to add, if it's helpful, that the state system designates reprimands as discipline, and you have all these informal types of

discipline, counseling memorandums are often referred to or informal discussion memorandums, you know, citing different behaviors that occur.

But if it's titled a reprimand, if a state calls it an official reprimand, then it becomes discipline. It requires notice under the Skelly provisions, and that's how the state differentiates it, and it sounds like the local governments do something similar. No?

MS. SHELTON: I thought I heard the city say something a little bit different. The way staff wrote the analysis was identical to what Ms. Stein was just saying. And I think what the city is saying, and correct me if I'm wrong, is they see it as two different steps: One, an adverse comment, and that that does result in something else, like, whatever, another disciplinary action, and then they go through whatever steps are required at that stage. So, if they're duplicative, they're duplicative.

Is that correct?

MS. CONTRERAS: Yeah, I think it can. And the right to respond exists to things much less than formal discipline.

CHAIRPERSON PORINI: Yes.

MR. BELTRAMI: Camille, what about the comment that Ms. Stein made about the amendment of December '98? Does that take the probationary focus out of the system?

MS. SHELTON: It does affect -- yes, as of January 1st, 1999, but, until that time, they're included. The amendment was made in 1998 and became effective January 1,

1999, so, up until that date, probationary and at-will employees were entitled to administrative appeal until December 31st, 1998.

MR BELTRAMI: Thank you.

CHAIRPERSON PORINI: All right.

Yes, Mr. Foulkes.

MR. FOULKES: One last one. In the language that talks about providing prior notice to peace officers regarding the nature of the investigation, correct me if I'm wrong, but isn't that required now, not prior notice but subsequent notice?

And the question is: If you have to give the notice and the timing is changing but the notice isn't changing, is that adding additional duties or not?

MS. SHELTON: Are you talking about what the receipt of a written reprimand is?

MR. FOULKES: Um --

MS. SHELTON: Or what page?

MR. FOULKES: Yeah. I'm talking about page A-29, No. 3, under the staff recommendations.

MS. SHELTON: You're talking about the third activity under the conclusion and staff recommendation?

MR. FOULKES: Right.

MS. SHELTON: Staff found that that was a new program or higher level of service because notice is required before any disciplinary action is -- I mean, misconduct is charged, so it's notice prior. I mean, this is a requirement before they even get into the due process rights.

MR. FOULKES: Okay. So that they would still be required to send the notice after?

MS. SHELTON: If it results in disciplinary -- if the interrogation results in a disciplinary action, right.

MR. FOULKES: Okay.

MS. CONTRERAS: I think that notice refers to what I call the blue sheet. We have to tell them, at the commencement of an investigative interview, why we're talking to them, as opposed to the normal process where you just start talking to them and asking them questions about where they were yesterday.

I mean, if the complaint is that -- you have to say, you know, "There's been a complaint that you were parked outside the city limits." So then -- and, normally, you'd say, you know, "Where were you on Wednesday the 21st? Where were you yesterday? Where did you go here? Where did you go there?" You can ask all kinds of questions.

And, if they never get outside the city limits, then you can say, "Gee, why, in that case, did the city manager see you park at a liquor store in West Sacramento last Tuesday at about 11:00?" And then they go, "Oh, gee. I must have forgotten that part."

So, in the case of the police officer, he knows at the beginning that you saw his squad car parked at the 7-11 in West Sacramento, so it changes the texture of the investigation. And it is an additional burden.

MR. BELTRAMI: Don't you do joint work with West Sacramento?

MS. CONTRERAS: How do you think that we know that they're there? Call the city manager's office, report to the 7-11.

MS. GOMES: I have a question about that, when you say that that creates a higher burden by them knowing what's going to be happening during the investigation.

Could you explain how did that create a higher burden?

MS. CONTRERAS: Well, in many cases, it can change the way you handle an investigation, and it can impact the amount of information you have to have before you get there. Typically, we get a complaint. We interview whoever the complainant is and any witnesses they may identify, and then you basically talk to the employee and confront them with information that you've received in most cases; but it changes the nature of the questioning that you have to do and the amount of information you have to have ahead of time in order to be absolutely certain of what your facts are, because the employee is going to know where you're going before you get into the interview.

He reads the blue sheet, talks to his attorney and comes in with a defense, so you have to have a substantially greater amount of information in order to get to where you need to be. Most investigations are not as easy as, "Where were you at 11:00 o'clock yesterday?" They tend to be complex, and many of them relate to things like tactics.

So knowing ahead of time where we're going means we have to have a lot more information in order to get an

effective case investigation and obtain a result that gives us, what we believe, to be the reality of the situation.

CHAIRPERSON PORINI: All right. Thank you.

Mr. Beltrami.

MR. BELTRAMI: Camille, why did we break it down by the type of entity, why do we have something for county, something for school districts?

MS. SHELTON: The reason I did that --

MR. BELTRAMI: Yes.

MS. SHELTON: -- was because POBOR does apply to peace officers employed by local agencies and school districts. Unfortunately, in this situation, there were prior statutory schemes related to adverse comments that were different for school districts and county and special districts and cities, and so that's why I broke that down, because the prior law was different for each type of entity, which made it very confusing.

CHAIRPERSON PORINI: All right. Other questions or comments?

MR. BURDICK: If I can just make one comment, and that is: I think this has been helpful, the discussion today. And one of the things we talked about is that if you agree with staff recommendation, and hopefully with the amendments that are recommended by local government, or with or without them, we think that the step next is obviously Parameters and Guidelines, to sit down and kind of negotiate and discuss these things, where we're going to, for the first time, really have an opportunity to sit down with both sides,

state agencies, as well, and with Camille, to go through these things and sort them out.

I think that some of these issues that now are unclear can be clarified at that point and then staff can probably come back and hopefully we can all reach an agreement, but, if there aren't, we could probably narrow them down to fewer items and be a little more specific.

As you can see, it's an extremely complex issue but that's one of the problems, sometimes, as we go into there, this process becomes a little bit adversarial in the sense of people sending documents back and forth. We did have an opportunity to sit down, and we did request an initial meeting, but, unfortunately, until after the hearing, it seems like, very often, sometimes the state agency people feel a little reserved, at least it's my perception they feel a little reserved, about what they might want to comment on, in the sense that they may say something -- that they may agree to something that is mandated that maybe they shouldn't have agreed to, or whatever. I would hope that, as we move along, that if there are areas that you're not clear, that you just leave those on the table to be dealt with at the Parameter and Guideline process.

MS. SHELTON: Can I comment on that?

CHAIRPERSON PORINI: Please.

MS. SHELTON: I agree that the activities described in the Parameters and Guidelines are going to be far more detailed than what is provided in the staff analysis, but the activities that are listed in the staff analysis are required

to be analyzed by the Commission to first determine if there's a reimbursable state-mandated activity.

The issue, with regard to written reprimands, you need to make a finding on that today to determine whether or not that's going to be included as a reimbursable state-mandated activity. I don't think you can leave that to the Parameter and Guideline stage.

What you can leave to the Parameter and Guideline stage would be how much activity do you want to give them to determine whether or not a transfer is punitive? I mean, those types of questions can come at the Parameter and Guideline stage, but this language in here is directly from the statute. I would not recommend leaving these issues for the Parameter and Guideline stage.

CHAIRPERSON PORINI: All right.

MS. SHELTON: But the scope and the extent, those types of issues may be left to the Parameter and Guideline stage.

MR. BURDICK: Just a comment. I think there's a question of what is proper to do. I think you can do -- leave them if you want. You have the discretion to do that. I don't think that -- and I'd like to clarify. I don't think Camille is saying you can't do it; I think she's saying you probably shouldn't do it, or staff wouldn't recommend it.

But, I guess, that is also an issue where we've dealt with -- or we haven't had a lot of clarity on, and this might be a good time to get some clarity, although maybe not with two brand new members today, although Michael has been

here once before, but that, I think, is an important issue, whether or not things of that nature can, because they are going to come back to you in the Parameter and Guideline process.

CHAIRPERSON PORINI: Camille.

MS. SHELTON: Let me just mention the fact that these activities listed in here are critical to determine whether a new program or higher level of service exists and whether there are costs mandated by the state. Those are test claim issues not Parameters and Guidelines issues.

CHAIRPERSON PORINI: Ms. Steinmeier.

MS. STEINMEIER: I would like to move the staff analysis with the addition of the activities of providing tape recordings of interrogations. That isn't -- there is something about a tape recording here, but producing the transcripts sometimes with a tape recording, and that isn't in the staff analysis or the staff recommendation, so, with that addition, I would like to move it.

MR. BELTRAMI: Second.

CHAIRPERSON PORINI: All right. We have a motion and a second.

May we have role call?

MS. HIGASHI: Mr. Beltrami.

MR. BELTRAMI: Yes.

MS. HIGASHI: Ms. Gomes.

MS. GOMES: Yes.

MS. HIGASHI: Mr. Foulkes.

MR. FOULKES: Yes.

MS. HIGASHI: Mr. Van Houten.

MR. VAN HOUTEN: Yes.

MS. HIGASHI: Ms. Steinmeier.

MS. STEINMEIER: Aye.

MS. HIGASHI: Chairperson Porini.

CHAIRPERSON PORINI: Nay.

All right. Thank you very much.

MS. STEINMEIER: And thanks, also, to the staff for the phenomenal effort that's gone into this staff analysis.

CHAIRPERSON PORINI: Just for the record, Mr. Burdick, so that Mr. Van Houten won't feel left out, he has joined us on numerous occasions when Mr. Sherwood has not.

MR. BURDICK: I apologize.

MR. BELTRAMI: Madam Chairman, may I just tell Ms. Contreras that everything that comes to courts are arcane.

MS. CONTRERAS: Thank you very much.

CHAIRPERSON PORINI: Okay.

MS. HIGASHI: Next is the Mandate Reimbursement Process. This item will be presented by Piper Rodrian of our staff. And I'd like to commend her. She's our staff person responsible for our consent calendar items.

MS. RODRIAN: Good morning.

These Parameters and Guidelines allow claimants to seek reimbursement for costs incurred during the mandate process. The original Parameters and Guidelines were adopted in 1986. Since 1995, staff has updated them annually to

EXHIBIT O

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--o0o--

TIME: 11:00 a.m.

DATE: November 30, 1999

PLACE: State Capitol, Room 126
Sacramento, California

--o0o--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By: YVONNE K. FENNER, CSR License #10909, RPR